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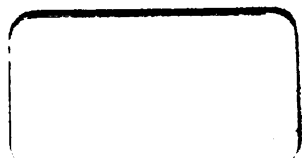
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53
WASHINGTON REPORTS

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IN THE

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OF

WASHINGTON

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SUPREME COURT OF WASHINGTON
DURING THE PERIOD COVERED IN THIS VOLUME

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ERRATA

Page 631, 2d syllabus, last line, for vendee read vendor

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 6591. Decided March 19, 1907.]

EDWARD BELCH, *Respondent*, v. BIG STORE COMPANY,
Appellant.¹

APPEAL—REVIEW—VERDICTS—CONFLICTING EVIDENCE. Where a contract was executed in duplicate and both copies left with the attorney who drew the papers, the verdict of the jury upon an issue as to whether the contract was completed, or was to be delivered in a certain event, is conclusive where the evidence was conflicting.

CORPORATIONS—REPRESENTATION—AUTHORITY OF MANAGER—PLEADING. In an action upon a contract executed by the manager of the defendant corporation, an answer alleging that the signing and whatever was done in the matter was done by the corporation by its manager, admits that the manager was authorized to make the contract for the corporation, and no proof thereof is required.

PARTNERSHIP—CONTRACTS—SHARE IN PROFITS. A partnership relation is not necessarily established by a contract employing one to conduct its plumbing and tinning business for the compensation of four dollars a day and one-half of the net profits.

DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS. In an action to recover damages for breach of a contract to employ a plumber for one year to conduct the defendant's plumbing business, at the agreed compensation of \$4 per day and one-half the net profits of the business, the plaintiff is entitled to substantial damages for prospective profits, and a verdict of \$400 will not be disturbed where there was evidence that the business was the continuation of an established business, which had not been conducted at a loss, and of other circumstances affecting the subject.

¹Reported in 89 Pac. 174.

Appeal from a judgment of the superior court for Kittitas county, Gilliam, J., entered June 23, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the breach of a contract of employment. Affirmed.

Pruyn & Felkner, for appellant

Hovey & Hale and *Graves & McDaniels*, for respondent.

HADLEY, C. J.—This is an action for damages for alleged breach of contract. The plaintiff alleges that the contract was reduced to writing. The terms of the writing upon which plaintiff relies are admitted by the defendant, and the essential parts thereof are as follows:

“This agreement made and entered into this 29th day of December, 1905, by and between the Big Store Company, a corporation of Ellensburg, Washington, party of the first part hereof, by its manager George R. Bradshaw, and Edward Belch, of Ellensburg, Washington, party of the second part; Witnesseth: That said first party hereby employs said second party for the term of one year from this date, to manage and conduct and work at the business of plumbing and tinning for the said first party, and to attend to and do whatever business in either one of said lines of business there may be done at the plumbing establishment of said first party or elsewhere for it during said time. The financial part of said business is to be managed and controlled by said first party. The mechanical part of said business and the matter of ordering and receiving stock for said business, and of making contracts for said business in the line of work to be done and material furnished, is to be under the direction and control of said second party. The tools and stock now on hand in said business of said first party is to be invoiced and turned over to said second party. Said second party is to receive as full compensation for his services under this agreement, out of the profits of said business, the sum of four dollars per day, and one half of the net profits of said business over and above said sum of four dollars per day. At the termination of the term of this agreement said second party will deliver to said first party all of the goods and tools be-

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Opinion Per HADLEY, C. J.

longing to it which shall have come into his possession under this agreement, and said parties hereto will then invoice the same."

The above instrument was signed by the plaintiff, and also by George R. Bradshaw, the manager of the defendant corporation. The defendant alleges that the instrument was never delivered, and that it never became a contract. At the time it was drawn and signed, it was left with Mr. Felkner, the attorney who drew it for the parties. The instrument was drawn and signed in duplicate, one copy being prepared for each of the parties.

The plaintiff alleges, that the attorney in all things pertaining to the preparation of the writing was acting for both parties, and that the papers were left with him temporarily, one copy being held for the plaintiff and the other for the defendant. The defendant, upon the other hand, alleges that the agreement was not to become operative and was not to be delivered to either of the parties, in any event, until after the next regular annual election of officers for the defendant corporation, which election was to take place on or about the first Monday in January, 1906; that if the said Bradshaw should be re-elected manager of the defendant corporation, then, in that event, the drafts of the agreement signed and left with Mr. Felkner should not be delivered to either of the parties by him; that if said Bradshaw should not be elected manager of the corporation at said election, then the agreement should be delivered upon the joint request of the parties, on copy thereof to each of them; that said Bradshaw was elected manager, and said agreement was never delivered but that it is wholly inoperative. The draft of the written agreement was prepared and signed on December 29, 1905, and the plaintiff avers that it was but the modification of an agreement which had in substance existed between the parties, and under which they had operated for some time prior to said date. It is also averred that about January 6, 1906, the defendant repudiated its said agreement and an-

nounced to the plaintiff that it would no longer carry out its terms in any respect. This suit was brought in the same month, and the complaint alleges the damages resulting from the breach to be in excess of \$3,000. The cause was tried before a jury, and a verdict was returned in favor of the plaintiff in the sum of \$400. Judgment was entered for said sum, and the defendant has appealed.

It is contended by the appellant that the contract never became operative, because the writing was never delivered. The testimony upon this subject is in sharp conflict. The respondent testified that the contract was completed at the time of the signing, and that the copies were left with Mr. Felkner for the respective parties, simply because appellant's manager requested that they be so left, so that nothing might have to be said about the agreement until after the election of officers of defendant company, which would occur in a few days. He testified, however, that the agreement became in all respects a completed one immediately after it was signed. The jury evidently gave credence to respondent's testimony, and since by their verdict they have found that the contract was completed, that has become an established fact in the case. There was ample evidence to support the jury's finding, and it was their province to determine whose testimony was entitled to the greater weight.

It is next urged that the contract is not one which can be enforced, for the reason that no evidence shows authority for the manager of the appellant corporation to make such a contract. Under the pleadings that question is not in the case. Appellant's answer avers: "The said plaintiff and the defendant corporation by its manager had drafted a certain agreement relative to said plaintiff working for said corporation defendant, which said agreement was signed by the plaintiff and the said defendant corporation by its manager George R. Bradshaw." Thus under appellant's own allegation it is expressly stated that whatever was done about the making of the contract was the act of the corporation through its manager.

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It is further argued that the contract is not within the corporate powers, for the reason that it establishes a partnership between the corporation and the respondent which, it is urged, cannot be done without special authority in the articles of incorporation. A contract entered into by a corporation is presumed to be within the corporate powers unless the contrary appears, and the burden of proof is upon the one who attacks the contract as *ultra vires*. 1 Clark & Marshall, Private Corporations, § 174. We think the contract shows no more than an employment of respondent to conduct the plumbing and tinning business of appellant, and such an employment was certainly competent. There is certainly nothing before us to show that appellant was not empowered to engage in that business. The very terms of the written contract are that appellant "employs" respondent for the term of one year "to manage and conduct and work at the business of plumbing and tinning." The mere fact that the amount of respondent's compensation was to be regulated by the amount of profits from that part of the appellant's business did not necessarily establish the partnership relation.

"Under the modern doctrine of partnership, persons are not liable as partners to third persons, although they share the profits of a business, unless they are in fact partners *inter se* or have held themselves out as partners under such circumstances as to estop them from denying their partnership. The celebrated case of *Cox v. Hickman* was the beginning of this doctrine, though the true rule seems to have been recognized in a few earlier cases in the United States. In this case it was decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents. It was at once the end of the old theory of partnership and the starting point of a new doctrine. It put an end to two notions which had theretofore been regarded as fundamental: first, that third persons may hold to the liability of partners those who in fact are not partners, merely because some other relation exists between them; and, second, that participation in the

profits of a business is conclusive of a partnership." 22 Am. & Eng. Ency. Law (2d ed.), p. 20.

See, also, numerous cases cited to support the last statement in the text.

It is next argued that the evidence as to prospective profits from the contract was insufficient to establish a basis for recovery. The verdict has established that there was a contract, and it is not disputed that if there was a contract, there was a breach thereof. Certainly respondent was entitled to recover at least nominal damages. It is true his compensation was dependent upon the realization of the profits, but shall he be prevented from recovering substantial damages merely because the amount of profits cannot be accurately known, and that too because he was prevented from performing the contract by the wrongful act of appellant? When a contract of this kind has been broken, it is never possible to exactly determine what would have occurred if the contract had been carried out. But justice requires that the wronged party shall not be deprived of substantial redress. The amount of such profits must therefore be determined by the jury from all the tangible evidence upon the subject. Of course, the evidence should be sufficiently tangible and reasonable to afford a rational basis for recovery. "The recovery must, of course, be limited to the amount which, from all the surrounding conditions, may be deemed to have been reasonably certain had the breach not occurred." *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418. We think the evidence was sufficient to warrant the recovery of \$400, the amount of the verdict. The business that respondent was to conduct was to be by way of a continuance of a plumbing and tinning business that had been theretofore for a long time conducted by Mr. Hornbeck, one of appellant's trustees. The appellant was to succeed to that business, and it was to become merely one department of appellant's business, which department respondent was employed to manage. It was not shown that Mr. Hornbeck

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Syllabus.

had conducted the business at a loss. He had conducted it through a foreman whose compensation had been paid from the proceeds of the business. The regular plumbers' scale of wages was shown to be \$4 per day, and that was the per diem respondent was to receive. The jury were justified, under these circumstances, and others appearing in evidence, in finding for respondent the sum returned by them.

A number of errors are assigned upon the rulings of the court during the introduction of testimony, and upon instructions given and refused. We do not think appellant was prejudiced in these particulars, and a detailed discussion of them would require more space than their importance demands.

Finding no error, the judgment is affirmed.

FULLERTON, MOUNT, CROW, ROOT, and DUNBAR, JJ.,
concur.

[No. 6521. Decided March 19, 1907.]

DELIA M. HOTCHKIN, *Appellant*, v. C. B. BUSSELL *et al.*,
Respondents.¹

JUDGMENTS — VACATION — DEATH OF PARTY — RIGHT TO RELIEF. Where H., having an interest in tide lands, contracted with C. to obtain the title from the state, and C. took an appeal from the decision of the board of land commissioners awarding the property to other parties, but died pending final judgment on the appeal, which judgment recited the fact of C.'s death and that his heirs at law, who also had since died, had conveyed their interests to others, to whom the decree then awarded the property, H. cannot sustain an action by her to set aside the judgment as in fraud of her right, by allegations that parties to the action were dead before entry of the judgment, and that their interests had not been represented by an executor or administrator or other legal representative; since the death of a party does not render the judgment void or subject to collateral attack, but only voidable on timely motion; and since the decree was not rendered in a strictly adversary proceeding, nor by the court of

¹Reported in 89 Pac. 183.

original jurisdiction, but was an appellate decree, the vacation of which would only reinstate the appeal and not necessarily benefit the plaintiff.

SAME—TRUSTS—CONVEYANCE BY TRUSTEE. In such a case, the assignment by the heirs at law of C. passed his preference right to purchase the tide lands, without the appointment of an administrator, and was properly recognized by the court in entering the decree, which was conclusive of the fact that the right passed by the assignment; and the recourse of H., if C. was acting as her trustee, must be against the other parties to the proceeding, for an accounting, the decree being valid although the trusteeship continues.

SAME—PLEADING. In such a case, an allegation that a different decree would have been rendered, had C. been alive or had an administrator been substituted, is an expression of opinion and not an allegation of fact.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 3, 1906, upon sustaining a demurrer to the complaint, dismissing an action to set aside a judgment determining the preference rights of conflicting claimants to purchase tide lands. Affirmed.

James M. Epler, for appellant.

Ballinger, Ronald, Battle & Tennant, Pierre P. Ferry,
and *George E. de Steiguer*, for respondents.

FULLERTON, J.—The appellant instituted this action to set aside a judgment entered in the superior court of King county on an appeal from a decision of the board of state land commissioners determining which of several applicants had the right to purchase certain tide lands belonging to the state. A general demurrer was interposed and sustained to her complaint, whereupon she elected to stand thereon. Judgment of dismissal was thereupon entered against her, from which she appeals. The ultimate question to be determined on the appeal, therefore, is, does the complaint state facts sufficient to constitute a cause of action.

In substance it was alleged in the complaint, that the appellant had a valid and subsisting interest in and to blocks

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404 and 405, of the tide lands lying in front of the city of Seattle; that on April 20, 1895, she entered into a contract with one William Collins and one W. P. Trimble, in which it was agreed that the appellant and Collins should retain the said Trimble as their attorney to obtain title for them to said tide lands from the state of Washington; that in consideration thereof, Trimble agreed to act as their attorney and obtain the land from the state of Washington, if possible, for which service he was to receive an undivided one-fourth interest in and to all lands he should so obtain; that it was further agreed that the costs should be met by Collins paying one-half thereof and Trimble and the appellant one-fourth each; that the application for the lands was to be made in the name of Collins; that Collins recognized the right of the appellant to a one-fourth interest in the land, and agreed for himself and his heirs and assigns that, on receipt of a certificate of purchase for the lands, he would convey a one-fourth interest therein to the appellant, and a one-fourth interest therein to W. P. Trimble.

It is then alleged that the tide lands mentioned in the contract are a part and parcel of the lands involved in a certain judgment rendered by the superior court of King county on July 27, 1903, on an appeal by William Collins and others from an order and judgment of the board of state land commissioners awarding certain persons the preference right to purchase the lands. The decree was then set out in full. The decree recited that the persons who had applied to purchase the tide lands were George Kinnear, W. R. and D. C. Brawley, William Collins, Leary-Collins Land Co., Philadelphia Mortgage and Trust Co., Merchants National Bank; and Washington Dredging & Improvement Company whose appeal had been dismissed; that the persons appealing were, George Kinnear, W. R. and D. C. Brawley, William Collins, and the Leary-Collins Land Co.; that one of the applicants, the Merchants National Bank, had theretofore sold and assigned all of its rights in and to the tide

lands in question to the Elliott Bay Tide Land Co.; that said George Kinnear, W. R. and D. C. Brawley, Leary-Collins Land Co., Elliott Bay Tide Land Co., and the heirs at law of William Collins, who was then dead, had sold and assigned to the intervener, McNaught-Collins Improvement Co., all of their respective rights and interests to a certain described portion of block 404; and that said Leary-Collins Land Co., Elliott Bay Tide Land Co., and McNaught-Collins Improvement Co., had sold and assigned to George Kinnear, W. R. and D. C. Brawley, all their right, title and interests in and to certain described portions of block 405; and that the several grantees and grantors were the owners of the upland on which the tide lands described abutted, and had a preference right to purchase the same, and were the first applicants for the purchase thereof. The decree then proceeds to award the blocks in certain proportions to the parties named.

The complaint then alleged that, before the decree was entered, both William Collins and D. C. Brawley had departed this life, and that no administrator, representative, or successor had been substituted in the proceedings to represent their interests; and that before entering the judgment and after the death of Collins, parties to the proceeding had solicited the appellant to "dispose of her interests in the case and sell the same for a consideration of some few hundred dollars, and that she had refused to compromise the litigation on the terms proposed."

It was further alleged that the decree was taken without notice to the appellant of the time of its taking, or of its terms; that the taking of the decree was in violation of her contract with Collins, and that had he been living, or had an administrator been substituted for him, the decree would not have been signed; that the respondents all had notice, both actual and constructive, of her claim of a preference right to purchase the tide lands in question, and that the contract between herself and Collins and Trimble was duly recorded;

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and that the defendants and Trimble have by said decree attempted to fraudulently deprive her of her rights.

The prayer is that the judgment be held and declared to be null and void, and set aside as a cloud upon the title of the appellant to the tide lands described in the contract set out in the complaint.

The appellant contends that the facts alleged in the complaint show that the judgment of the superior court is void, or at least voidable, and that in either event she is entitled to have the same vacated and set aside as adversely affecting her interests in the tide-land property. The principal allegation relied upon to sustain this contention is the allegation that two of the parties to the proceeding were dead at the time the decree was rendered, and their interests were not represented by an executor, administrator, or other legal representative. But we do not think this fact alone sufficient to avoid the decree. In an adversary proceeding where one party seeks to recover directly from another, a judgment or decree rendered after the death of one of the parties does not render it void or subject it to collateral attack; at most it is only voidable, and to vacate it or set it aside it must be attacked within the time and in the manner provided by the statute for setting aside voidable and erroneous decrees. If, therefore, this were a decree in an adversary proceeding in the strictest sense, rendered in a court of original jurisdiction, we think it could well be doubted whether the allegations of the complaint show a sufficient interest in the plaintiff, or such timely action on her part, as would entitle her to the relief she demands. But the proceeding was not adversary in the sense that one of the parties sought to recover the land from another, nor was the decree rendered in a proceeding over which the court had original jurisdiction. On the contrary, the sole dispute between the parties was over the question as to which of them had the preference right to purchase the land from the state of Washington. Primarily this was a question for the state land department to decide, and the juris-

diction of the superior court was wholly appellate. And since its jurisdiction was appellate, the vacation of its decree would not necessarily benefit the appellant. It would do this only in case the judgment of the court of original jurisdiction was in appellant's favor, and was changed by the decree of the appellate court. This follows from the fact that setting aside the appellate decree would not reinstate the appeal, but would only relegate the right of the parties to the judgment of the court of original jurisdiction. But there is no allegation in the complaint that the appellant's rights are any different under the decree of the appellate court than they were under the decree of the court of original jurisdiction, and it will not be presumed they were in aid of the complaint. In so far as the allegations of the complaint are concerned, therefore, it does not appear that the appellant has any such interest in the decree of the court she attacks as will permit her to maintain a suit for its vacation.

But the judgment of the court below can be sustained on other grounds. A claim of preference right of purchase is one that can be abandoned at any time by the claimant. So he may assign his claim and confer upon his assignee all the right he has in the premises. On his death his right will descend to his heirs and legal representatives, as other property rights descend; and the heirs and legal representatives to whom the right descends may convey that right to another. And in this case, when the heirs of William Collins sold and assigned such right as their ancestor had to purchase these lands to other claimants, they passed that right to them, and it was proper for the superior court in entering its decree to recognize the assignment. Nor was it necessary that some personal representative of the deceased be made a party to the proceedings in order to give validity to a decree recognizing and acting upon the assignment. The question whether the right passed by the assignment was one of fact, and inasmuch as the court found the fact, it is conclusive upon any other tribunal that has no power to review the fact. The rule

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is not changed because Collins was acting in part as trustee for the appellant. On the face of the record, he was acting in his own interest and right, and the court was not bound to make any further inquiry. If the other parties to the proceeding knew of the relationship, it would not avoid the decree, although it might obligate them to account to the appellant for such proportion of the property as Collins would have been obligated to account for had he been successful in sustaining his claim of a preference right of purchase. The decree is valid even though the trusteeship continues in the other parties.

Nothing is added to the complaint by the general allegations to the effect that the decree was in violation of the appellant's contract with Collins, or that, had he been alive, or had an administrator been substituted for him, a different decree would have been rendered. If the contract was violated, the appellant may be entitled to pursue the guilty parties, or those who knowingly profited by the breach of the contract, to the extent of the profit realized, but it is no ground for setting aside an otherwise valid decree; and the latter allegation is manifestly the mere expression of an opinion, not an allegation of fact.

The judgment appealed from is right, and will stand affirmed.

HADLEY, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 6555. Decided March 19, 1907.]

NIELS P. NIELSON *et al.*, Respondents, v. JOHN SPONER,
Appellant.¹

CONSTITUTIONAL LAW—DUE PROCESS—WATERS—RIPARIAN RIGHTS. The statute of 1890 (Bal. Code, § 4114) providing that a person shall have the first right to the use of spring waters arising on his land, is unconstitutional as to riparian rights to the use of the waters for domestic purposes by lower proprietors whose lands were patented prior to the enactment of the statute; as it deprives them of their property without due process of law.

WATERS AND WATER COURSES—RIPARIAN RIGHTS—EXTENT—IRRIGATION. An upper riparian proprietor is not entitled to divert all the waters of a stream for irrigation purposes, by means of a ditch running through porous soil occasioning much waste, so that none is left for domestic uses of lower owners.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered July 23, 1906, upon findings in favor of the plaintiffs, enjoining a riparian owner from diverting the waters of a stream for irrigation purposes. Affirmed.

Crites & Romaine, for appellant.

Walter B. Whitcomb, for respondents.

ROOT, J.—This action was brought by respondents, as lower riparian owners, to enjoin the appellant from unreasonably using and diverting the waters of Thomas or Spooner creek, a small stream flowing across the lands of appellant and respondents. From a judgment and decree in favor of respondents, this appeal is prosecuted.

It appears that there is very little water in said stream during the months of July, August and September; that at times during said period the appellant diverted said water for the purpose of irrigating his orchard. It is claimed by

¹Reported in 89 Pac. 155.

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respondents that this water was diverted by means of a small ditch running through soil that was very porous and which necessarily occasioned the loss and waste of much of the water; that the water was not returned to the creek, and consequently respondents could get no water for domestic purposes from said creek during the summer period when the water was so diverted by appellant. The latter claims that during said summer months there is no water in the creek excepting such as comes from a spring situated upon his premises, and contends that he is entitled to take all of such water that is capable of being used upon his premises. He relies as authority for this upon § 4114 of Bal. Code (P. C. § 5829), a part of which reads as follows:

“Provided, That the person upon whose lands the seepage or spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands.”

This statute was enacted in 1890. The evidence in this case shows that respondents' land was patented in 1883, and that it has been occupied ever since. Under the common law, each riparian proprietor had a right to ordinary use for domestic purposes of water flowing in a defined stream past or through his land. In the case of *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314, the supreme court of Washington Territory held that a lower riparian owner was entitled to, and could exercise, this right, even though the waters of such stream originated in a spring upon the land of the person seeking to divert them from the natural channel.

Under the authorities, it would seem that the privilege of the respondents' predecessors to use the waters of the stream in question here was a property right running with the land from the time it was patented by the government in 1883. This being true, an act of the legislature in 1890, authorizing a landowner to use all the spring water arising on his land and thereby destroying the use of such water to the lower riparian owner, would be unconstitutional as a taking or destroying of property without due process of law. Appellant

had the right to make free use of this water whether it came from a spring on his land or otherwise, for the ordinary domestic purposes; but we do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of prior, legal appropriation. See, also, *Nesalhouse v. Walker*, 45 Wash. 621, 88 Pac. 1032; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495; *Union Mill and Min. Co. v. Ferris*, 2 Sawyer 176; *Howe v. Norman*, 13 R. I. 488; *Brosman v. Harris*, 39 Ore. 148, 65 Pac. 867, 87 Am. St. 649, 54 L. R. A. 628; *Ellis v. Tone*, 58 Cal. 289; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. 864, 8 L. R. A. 202; *Pomeroy, Water Rights*, § 134; *Gould, Waters*, §§ 205, 536.

The judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 6306. Decided March 19, 1907.]

SAMUEL WRIGHT *et al.*, Respondents, v. C. A. BEARDSLEY *et al.*, Appellants.¹

PARTIES—PLAINTIFFS—HUSBAND AND WIFE—TORTS. An action by a husband and wife for failure to properly bury the dead body of their child is not subject to the objection that there is a defect of parties plaintiff.

DAMAGES—MENTAL SUFFERING—TORTS—PLEADING. Damages may be recovered for mental suffering inflicted by the wrongful or improper burial of plaintiffs' dead child, under a complaint alleging breach of contract to make proper burial, where the facts stated show a tort or injury to the person.

¹Reported in 89 Pac. 172.

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Opinion Per MOUNT, J.

DAMAGES—EXCESSIVE VERDICT—NEW TRIAL. A verdict for \$2,510 for damages for the wrongful burial of plaintiffs' dead child is so excessive as to show passion or prejudice, entitling the defendants to a new trial, where it appears that the child was born at a hospital and died five days later, that the defendants were informed that the plaintiffs were poor and could not afford a costly funeral, and would probably want to bury the body permanently at some other place, and the body was buried in a lot used for stillborn infants, on top of another coffin, about eight inches deep, and was not molested in any way, until pointed out to and removed by the plaintiffs to another lot in the same cemetery.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 25, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages. Reversed.

John C. Hogan and *W. I. Agnew*, for appellants.

Boner & Boner and *Ben Sheeks*, for respondents.

MOUNT, J.—The respondents brought this action to recover damages against appellants for the improper burial of a deceased child. They recovered a verdict and judgment for \$2,510. From this judgment the defendants appealed.

The complaint alleged, in substance, that the plaintiffs were husband and wife; that the defendants were copartners doing business as undertakers in the city of Aberdeen; that on December 12, 1905, plaintiffs lost their infant child, and contracted with defendants to bury the body in a decent, respectable manner, according to the usual customs and usage in performing burials; that in pursuance of the agreement, defendants took the said body and deposited it in a grave which was then used as the grave of another child, and left the body in a rough coffin without a box and within six inches of the surface of the ground, and on top of the coffin of another child; that after said pretended burial, and without knowledge of the manner of said burial, plaintiffs paid defendants the charges therefor; that, by reason of the failure of defendants to perform their duties under said contract,

plaintiffs have been damaged and have been caused to suffer great mental anguish, to their damage in the sum of \$5,000. The prayer was for that amount. The defendants interposed a demurrer to this complaint, upon the grounds that there was a defect of parties plaintiff and defendant, and that the complaint fails to state facts sufficient to constitute a cause of action. This demurrer was overruled. Defendants then filed an answer, admitting that plaintiffs were husband and wife, that defendants were copartners in the undertaking business, and that they entered into an agreement to bury plaintiffs' deceased child, but denied all the other allegations of the complaint. As a separate defense, the defendants alleged that they agreed with the plaintiffs to furnish a certain coffin and bury the body of the infant cheaply and temporarily in a lot used for the burial of stillborn infants, and that defendants fully and completely performed the said agreement, and that thereafter the body of said infant was exhumed by plaintiffs, in the presence of one of the defendants, and at said time, with full knowledge of the manner of said burial, the plaintiffs expressed complete satisfaction, and the body was thereupon re-interred in the same grave. At the close of plaintiffs' evidence, the defendants moved for a directed verdict upon the ground that the evidence was insufficient to sustain a judgment. This motion was denied by the court. Thereafter the court instructed the jury to the effect that if the jury found for the plaintiffs, they might award plaintiffs actual damages for mental suffering. After verdict the defendants moved for a new trial upon the statutory grounds. This motion was also denied.

It is first contended by appellants that there is a defect of parties plaintiff, but in view of the allegations in the complaint and the admissions in the answer, that the plaintiffs are husband and wife and that the defendants are copartners, there seems to be no merit in this contention. The persons who are the lawful custodians of a deceased body may maintain an action for its desecration. *Dunn & Co. v. Smith*

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(Tex. Civ. App.), 74 S. W. 576; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40. The mother and father certainly may join in such an action.

The questions whether the complaint states a cause of action, whether the evidence was sufficient to go to the jury, and whether the court erred in instructing the jury that damages might be given for mental anguish of the plaintiffs, are all based upon the same contention, viz., that the action is for damages for a breach of contract, and that mental anguish is not a proper element of damage in such cases. These questions may therefore all be considered together. While it is true that the complaint alleges that a contract was entered into and that by reason of the failure of defendants to perform their duty under the contract plaintiffs have been damaged, etc., still the facts stated in the complaint, and testified to by the plaintiffs, show that the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead; in other words, a tort or injury against the person. In cases of this character, the rule has frequently been applied that damages may be had for mental suffering. *Dunn v. Smith*, and *Koerber v. Patek*, *supra*; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. 370, 14 L. R. A. 85; *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 61 Am. St. 273, 38 L. R. A. 413; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471.

In the case of *Koerber v. Patek*, *supra*, the court said:

"Doubtless other illustrations might be suggested, but these suffice to satisfy us that there is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a wilful or wrongful invasion of that right is one of those *torts* for which damages for injury to feelings are recoverable as an independent element."

In the case of *Larson v. Chase, supra*, the court said:

"Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of the law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument."

It is true that the cases above quoted from are cases where the deceased body had been wrongfully mutilated, but the principle there discussed applies as well to a case such as the one at bar where the wrong consists of the manner of burial. *Dunn v. Smith, supra*. Where one person agrees to give a dead body decent burial, and under such agreement obtains possession of the body and in violation of his duty casts the body by the way, or wrongfully mutilates it, or disposes of it, or deposits it in a grave without covering, in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish, it would shock the sensibilities to hold that there was no remedy for such a wrong. We are, therefore, of the opinion that the trial court did not commit error in overruling the demurrer, or in denying defendants' motion for a nonsuit, or in instructing the jury that plaintiffs were entitled to recover actual damages for injury to the feelings.

Appellants next contend that the court erred in refusing the motion for new trial. This motion was based upon several grounds which, in all probability, will not arise upon a new trial, and which we shall not therefore discuss. We are clear that this motion should have been sustained, upon the ground that the verdict was excessive, so much so as to show passion and prejudice on the part of the jury. The facts, as stated by the respondents and which we assume are true for the purposes of this appeal, are in substance as follows: On December 7, 1905, the respondent Mrs. Wright gave birth to a child at a hospital in the city of Aberdeen. The child died

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five days later. Respondents thereupon sent for the appellants to bury the body. When the representative of the appellants called at the hospital, he was informed that Mr. Wright was a poor man and could not afford a costly funeral. Mr. Wright also stated that his wife would probably want to bury the body permanently at some other place. One of the appellants thereupon took the body of the child and carried it to his undertaking room and placed it in a small coffin, and the next day buried the child in a lot used for the burial of stillborn infants. No one attended the funeral except the undertaker. The father knew when the burial was to take place. On the day following the burial, Mr. Wright called upon the appellants to pay the bill. He was informed that the bill amounted to \$8.50. He gave the appellants \$10, saying: "No man can bury a child decently for \$8.50,"

Thereafter on May 6, 1905, the parents desired to remove the body of the child, and went to the office of appellants and informed Mr. C. A. Beardsley that they desired to see the grave. Mr. Beardsley was not well on that day and could not go to the cemetery with respondents, but directed them how they could find the grave. Respondents went to the cemetery, but were unable to locate the grave. They thereupon returned to Mr. Beardsley and told him that they could not find the grave, that they would be back the next Wednesday, and that if he did not then show them where the grave was an officer would be called. They returned on the next Tuesday, and requested Mr. Beardsley to accompany them to the cemetery. Mr. Beardsley agreed to go, but requested respondents to furnish a conveyance. Respondents refused to do this, but proceeded to walk to the cemetery, the distance being about one and a half miles. Mr. Beardsley immediately thereafter obtained a conveyance and arrived at the cemetery a short time ahead of respondents. He showed them the grave. Mr. Wright thereupon proceeded to exhume the body. He found the coffin buried only about eight inches below the surface of the ground, without any

box, and on the top of another coffin about the same size as the coffin his child was buried in. After the body was taken up and identified, it was replaced in the same grave by Mr. Wright and Mr. Beardsley, and re-covered. On the next day it was again taken up and reburied in the same cemetery by another undertaker.

The evidence showed that Mrs. Wright wept bitterly both at the time of her first visit to the cemetery when she was unable to find the grave, and at the time when the body was exhumed. She testified that her grief was caused by reason of the shallow depth the body was buried, and because the coffin was not placed in a box. There is no evidence that the body had been molested or mutilated in any way. Under these facts, we are satisfied that a verdict for \$2,510 is entirely out of proportion to the actual injury sustained. It is somewhere between five and ten times more than it ought to be, and indicates that the jury, for some reason—no doubt in part by the mother's tears, were induced by passion or prejudice to render a verdict in the nature of punitive damages against the appellants.

The judgment is therefore reversed, and the cause remanded for a new trial.

HADLEY, C. J., CROW, ROOT, DUNBAR, and FULLERTON, JJ., concur.

[No. 6605. Decided March 19, 1907.]

WASHINGTON BRICK, LIME & MANUFACTURING COMPANY,
Respondent, v. TRADERS NATIONAL BANK, *Appellant*.¹

GARNISHMENT—PROPERTY SUBJECT—DRAFTS. A draft is property and subject to garnishment within the meaning of the garnishment law.

SAME—OWNERSHIP OF PROPERTY—DRAFTS—BANKS AND BANKING—DEPOSITS. Where a draft is deposited with a bank which has a rule that in receiving collections it acted only as agent and assumed no responsibility beyond due diligence, the depositor receiving credit for the amount of the draft, but if the draft was not paid the amount was charged back, the ownership of the draft remains in the depositor, although he was allowed to check against it, as that was simply an accommodation extended; and upon garnishee process against the bank in an action against the depositor, it is properly found that, pending collection, an accepted draft deposited by the defendant is property of the defendant in possession of the garnishee.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 14, 1906, upon findings in favor of the plaintiff, against a garnishee defendant, after a trial on the merits before the court without a jury. Affirmed.

Graves, Kizer & Graves, for appellant. The bank was the owner of the draft. *St. Louis etc. R. Co. v. Johnston*, 27 Fed. 243; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *First Nat. Bank v. Armstrong*, 39 Fed. 231; *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Fourth Nat. Bank of Cincinnati v. Mayer*, 89 Ga. 108, 14 S. E. 891; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; 2 Morse, Banks & Banking (3d ed.), §§ 575-577. The draft was not property within the meaning of the garnishment statute. Rood, Garnishments, §§ 163, 164;

¹Reported in 89 Pac. 157.

Bowman v. First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 48 Am. St. 870; *Hallam v. Tillinghast*, 19 Wash. 20, 52 Pac. 329; *Price v. Brady*, 21 Texas 614; *Hancock v. Colyer*, 99 Mass. 187, 96 Am. Dec. 730; *Gilmore v. Carnahan*, 81½ Pa. St. 217; *Grosvenor v. Farmers and Mechanics' Bank*, 18 Conn. 104; *Hanford v. Hawkins*, 18 R. I. 432, 28 Atl. 605; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; *Craft v. Summersell*, 93 Ala. 430, 9 South. 593; *Scofield v. White*, 29 Vt. 330; 5 Cyc. 500; *Hobbs v. Merrifield*, 6 Ky. Law 660; *Mayes v. Phillips*, 60 Miss. 547; *Wilson v. Wood*, 34 Me. 123. The statute was borrowed from Texas legislation, already construed by the Texas courts. *Price v. Brady*, *supra*; *Taylor v. Gillean*, 23 Tex. 508; *Tirrill v. Canada & Rice*, 25 Tex. 455; *Carter v. Bush*, 79 Tex. 29, 15 S. W. 167; *Womack v. Stokes*, 12 Tex. Civ. App. 648, 35 S. W. 82.

Hamblen, Lund & Gilbert, for respondent. The relation of debtor and creditor existed between the bank and the drawer of the draft. *Morse, Banks & Banking*, pp. 427, 587; 3 Am. & Eng. Ency. Law (2d ed.), p. 817; *In Re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. 454; *Alpine Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *Beal v. Somerville*, 1 C. C. A. 598, 50 Fed. 647; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Jacob v. First Nat. Bank*, 5 Ohio Dec. 572, 6 Am. Law Rec. 690; *Decatur Nat. Bank v. Murphy*, 9 Ill. App. 112; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 383; *Armstrong v. National Bank of Boyertown*, 9 Ky. 431, 14 S. W. 411, 9 L. R. A. 553; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 15 Am. St. 515, 7 L. R. A. 352; *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193, 12 Am. St. 598, 2 L. R. A. 699; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, 19 Atl. 55; *Rapp v. National*

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Security Bank, 136 Pa. St. 426, 20 Atl. 508; *Second Nat. Bank of Columbia v. Cummings*, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. 618. The draft was "property" in the hands of the garnishee under our garnishment laws. *Pierce's Code*, §§ 545, 546, 551, 553, 557 (Bal. Code, §§ 5392, 5393, 5398, 5400, 5404); *Moore v. Gilmore*, 16 Wash. 123, 47 Pac. 239, 58 Am. St. 20; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. 806, 54 L. R. A. 204; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947; *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. 941; *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *Coombs v. Davis*, 2 Wash. Ter. 466, 7. Pac. 860; *Storm v. Cotzhausen*, 38 Wis. 139; *Burgess v. Capes*, 32 Ill. App. 372; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. 933; *National Bank of Galena v. Chase*, 71 Iowa 120, 22 N. W. 202; *Gillette v. Cooper*, 48 Kan. 632, 30 Pac. 13; *Elser v. Rommel*, 98 Mich. 74, 56 N. W. 1107; *Leighton v. Heagerty*, 21 Minn. 42; *Rood*, Garnishments, §§ 165, 166; *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113; *Stevens v. Dillman*, 86 Ill. 233; *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396; *Edwards v. Beugnot*, 7 Cal. 162; *Deering & Co. v. Richardson-Kimball Co.*, 109 Cal. 73, 41 Pac. 801; *Banning v. Sibley*, 3 Minn. 389; *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. 153; *Ide v. Hardwood*, 30 Minn. 191, 14 N. W. 884.

DUNBAR, J.—Respondent brought suit against Taplin, Rice & Company, a foreign corporation, and at the time of bringing the suit, on September 6, 1905, likewise garnished the appellant by service of writ of garnishment in the usual form. Appellant answered, denying that it was indebted to the defendant Taplin, Rice & Company, or that it had any goods or effects of said defendant. Respondent filed a controverting affidavit, alleging that, at the time of the service of the writ upon it, appellant had in its possession a draft drawn by defendant upon the Spokane Pottery Company, in

favor of the Second National Bank of Akron, Ohio, in the sum of \$1,419, which draft was accepted by the drawee on August 26, 1905, and paid to the appellant September 17, 1905. The controverting affidavit being taken as denied without further pleading, under the statute, trial was had. Judgment in favor of respondent against defendant Taplin, Rice & Company having theretofore been obtained by default, the trial of the issue between respondent and appellant was had, and judgment rendered by the court in favor of respondent for the full amount demanded.

The court found, and the record sustains the findings, that at the time of the service of the writ of garnishment upon the garnishee defendant, the garnishee defendant had in its possession and under its control a certain draft drawn by Taplin, Rice & Company, a corporation, in favor of the Second National Bank of Akron, Ohio, upon the Spokane Pottery Company, dated August 19, 1905, for the sum of \$1,419, which said draft was accepted by the Spokane Pottery Company on August 26, 1905, payable September 17, 1905; and found, as a conclusion of law, that the draft so made and accepted was the property of said Taplin, Rice & Company. It also found that Taplin, Rice & Company, at the time of the service of the writ of garnishment, was indebted to the respondent in the sum of \$291, and interest at the legal rate since January 1, 1900. The record shows that the draft was drawn by Taplin, Rice & Company and that, pending its collection, Taplin, Rice & Company was permitted by the bank to check against the amount of the draft, and on this statement it is claimed by the appellant that the court erred in holding the draft to be the property of Taplin, Rice & Company instead of the property of the Akron bank. It is also insisted by the appellant that a draft is not property within the meaning of the garnishment statute, and is not the subject of garnishment. An examination of the statute convinces us that it is broad enough to cover a draft, and that there was no error by the court in that particular.

On the principal question in controversy there is some conflict of authority, and without reviewing the cases cited by appellant and respondent respectively, we think it is settled, and correctly settled on principle, that the test of the ownership of the draft must be the responsibility for the draft. In this case it was testified by the assistant cashier of the Arkon bank that the bank had a rule to the effect that, in receiving collections, it acted only as an agent and did not assume any responsibility beyond due diligence on its part. The witness also testified that, in cases where drafts were given as this one was, and the depositor of the draft was credited with the amount of the draft, if the draft was paid that ended the matter, and that there was no charging back; but that if the draft was not paid, the amount of the draft was charged back to the party who drew the same. While the witness undertook to define agency, the facts that he testified to showed conclusively that the bank in its dealings in all this class of cases did act as the agent instead of the owner of the paper which it assumed to collect, and that it always charged the amount of the draft back to the drawer when it failed to make the collection. The bank either relies upon the draft or it does not rely upon it. If it does so rely absolutely, and the drawer of the draft obtains unconditional credit, then the condition of debtor and creditor is established. The draft is the property of the bank, and the credit is the property of the maker of the draft, who has no further interest in the draft nor responsibility for it. But this cannot be, even if the maker of the draft is permitted to check against it, if the understanding is that, if the bank fail to collect the draft, the amount is to be charged back to the maker; for the credit in such case is really given to the maker, who is held responsible ultimately, and the permission to check against it is simply an accommodation extended to the maker, and the draft is taken only as additional security, indicating to some extent the responsibility of the maker.

Under the circumstances of this case and the rules and customs of the bank as shown by the record, we think no error was committed by the court, and the judgment is affirmed.

HADLEY, C. J., ROOT, FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 6671. Decided March 20, 1907.]

THE STATE OF WASHINGTON, *on the Relation of John D. Atkinson, as Attorney General, Appellant*, v. E. W. Ross, *as Commissioner of Public Lands, et al., Respondents*.¹

MUNICIPAL CORPORATIONS — ORDINANCE — PASSAGE — MEETINGS OF CITY COUNCIL. An ordinance is not void on the ground that it was passed at the meeting at which it was introduced, contrary to a clause in a city charter, which further provided that the council shall meet on the first Monday of each month and shall not adjourn to any other place than its regular place of meeting, where it appears that the ordinance was introduced at a meeting of the city council on January 22, and passed at a meeting held on January 29, that the council had held a meeting on Monday evening of each week since the adoption of the charter, adjourning at each session until the next Monday evening, at which the regular order of business was followed, and where the council had a right to call special meetings, and adjourned *sine die* only on the last meeting of each two-year term; since its practice relating to adjournments was in effect the calling of special meetings, which were treated as regular meetings, under the liberal construction of the provisions required by statute.

SAME—BONDS—ISSUANCE—SUBMISSION TO VOTERS¹—NOTICE. Charter provisions with respect to the passage of an ordinance providing for the submission to the electors of a proposition to issue bonds are not mandatory when not of the essence of the thing to be done; and where the essential step in the proceedings—notice of the election—is duly taken and the rights of taxpayers are not prejudiced, bonds authorized by the election will not be invalidated by regarding adjourned meetings of the council as a continued meeting when the same were not so intended.

¹Reported in 89 Pac. 158.

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Opinion Per DUNBAR, J. .

Appeal from a judgment of the superior court for Thurston county, Rice, J., entered November 13, 1906, upon findings in favor of the defendants, after a trial on the merits, dismissing an action to enjoin the board of state land commissioners from investing state funds in certain municipal bonds. Affirmed.

The Attorney General, and A. J. Falknor and J. B. Alexander, Assistants, for appellant.

Scott Calhoun and Elmer E. Todd, for respondents.

DUNBAR, J.—This action was brought in the superior court of Thurston county, by the state of Washington on relation of its attorney general, against the board of state land commissioners, to enjoin the board from investing moneys of the permanent school fund of the state in an issue of general city bonds of the city of Seattle in the amount of \$600,000, which bonds were authorized by an ordinance of the city council of Seattle, after the submission to the qualified voters of said city of the question of the issuance of such bonds, and upon a favorable vote thereon. The petition alleged that, on January 29, 1906, the city council attempted to pass an ordinance specifying and adopting a plan for enlarging and extending the municipal light plant of said city and authorizing an indebtedness therefor, submitting the same for ratification or rejection to the qualified voters of said city at an election to be held; that such ordinance was passed at a meeting which was an adjourned session of the same meeting at which such ordinance was introduced, and that the passage of such ordinance at such adjourned meeting was in violation of the charter provision of the city of Seattle, providing that no ordinance other than for appropriation for salaries or current expenses should be passed on its final reading at the meeting at which it is introduced. This is the only question in the case. The court held that the bonds were legal, and judgment of dismissal was rendered, from which this appeal is taken.

It appears from the findings of fact, which are undisputed, that the charter of the city of Seattle provides that the council shall meet on the first Monday of each month, that all its sessions shall be public, and that it shall not adjourn to any other place than its regular place of meeting; that no bill shall become an ordinance unless on its final passage at least a majority of all the members elected vote in its favor; that the ordinance providing for the issuing of the bonds under discussion was introduced at a meeting of the city council held January 22, 1906, was read the first time and referred to the appropriate committee; that on January 29, 1906, the city council held a meeting, and at said meeting read said ordinance a second and third time and passed the same, after a vote of all the councilmen present, eleven of said councilmen being present and two being absent, it further appearing that the two councilmen who were absent at the time of the passage of the ordinance were present when the ordinance was introduced and read the first time. It also appears, that the city council of the city of Seattle has held a meeting on Monday evening of each week, and at each session adjourned until the next Monday evening, unless for some reason a meeting was called on some previous night; that the council has met on every Monday evening since the adoption of said charter, except during the month of August of one or two years, when there was no meeting on account of vacation.

The findings of fact show that there were many meetings of the city council during the month of January, 1906, and while it is true that those meetings were pursuant to adjournment, it does not necessarily follow that they were adjourned or continued meetings in the sense that they all constituted one and the same meeting. It is conceded that the council had a right to call special meetings, and it is settled by authority that any business may be transacted at a special meeting, and that the purpose of the meeting need not be stated unless the law requires it, and it is conceded that the

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charter of Seattle does not require it. What the council did, in effect, when it adjourned on motion, was to call a special meeting. This intention was simply expressed by the motion for adjournment to a certain time. It is true that ordinarily this might technically constitute an adjourned meeting, but the facts show that such was not the intention in this case, for the council met regularly every Monday evening, and instead of commencing the business where it left off at the previous meeting, the manner of transacting the business showed that it was intended to be treated as a regular meeting, the business being transacted as follows: 1. Roll call. 2. Approval of the journal. 3. Special order. 4. Communications and reports from city officers. 5. Petitions and remonstrances. 6. Reports of standing committees. 7. Introduction of resolutions. 8. Introduction of bills by committees. 9. Introduction of bills by members. 10. First reading of bills. 11. Second reading of bills. 12. Third reading of bills. 13. Unfinished business. 14. Other business. The court also found that it was generally known throughout the city of Seattle and by its citizens that the city council of the city of Seattle regularly held its meetings on Monday evening of each week, and that the council had only adjourned *sine die* on the last meeting of each two years' term. So that the council evidently did not give much consideration to the parliamentary language used in the motion to adjourn, and if bound to the technical meaning of such language, could be held to have had only one regular meeting in two years, a construction which, of course, the council did not place upon its proceedings, and which a court would not be authorized to place upon them.

The rule of strict construction contended for by appellant cannot obtain under the express provisions of the statute. The act providing for the incorporating of cities of the first class, Pierce's Code, § 3735 (Bal. Code, § 742), provides that the rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act, but

the same shall be liberally construed for the purpose of carrying out the objects for which this act is intended. Again, the passing of the ordinance was not the most essential step in the proceeding. The most essential thing was the notice which was given to the taxpayers, and the exercise of their right to vote upon the question of the issuing of the bonds. It is not contended that the notice was not regularly given and the election regularly held in all respects. It was said by the supreme court of California, in *Derby & Co. v. Modesto*, 104 Cal. 515, 38 Pac. 900, where the ordinance was introduced and passed at the same meeting at which it was introduced, and where it was contended that the bonds were thereby invalidated, the laws of California requiring that no law should be passed on the day of its introduction or five days thereafter, that the purpose of the requirement was to give time for consideration with a view to prevent hasty and ill-considered legislation; that the whole machinery of the act was framed with a special view to the intelligent action of the voters of the municipality in whose hands rests the power to authorize or refuse to authorize the incurring of the proposed indebtedness; that the whole proceeding from beginning to end was a single specific proceeding for the accomplishment of a single special purpose. This court in *Parkinson v. Seattle School District*, 28 Wash. 335, 68 Pac. 875, approvingly quotes from that case the following language:

“Those directions which are not of the essence of the thing to be done, and by the failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory.”

The voters having received the notice required by law, having been permitted to express their choice on the question proposed in the manner prescribed by law, and the acts and proceedings of the council showing that it was not intended that the weekly Monday evening meetings of the council should be continued meetings, notwithstanding the manner

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Opinion Per Root, J.

of adjournment, no provision of the law was violated, and the judgment of the court is affirmed.

HADLEY, C. J., MOUNT, CROW, ROOT, and FULLEBTON, JJ., concur.

[No. 6520. Decided March 20, 1907.]

L. M. HARTLEY, *Respondent*, v. FLOYD FERGUSON *et al.*,
Appellants.¹

APPEAL—REVIEW—DISCRETION—NEW TRIAL. An order granting a new trial, which does not show upon which one of several grounds it was based, will not be reversed on appeal in the absence of a showing of abuse of discretion.

Appeal from an order of the superior court for Lincoln county, Warren, J., entered June 29, 1906, granting to the plaintiff a new trial, in an action to foreclose a mortgage. Affirmed.

George M. Ryker, J. T. Mulligan, and H. N. Martin, for appellants.

Dye & Reiter and McCoid & Finley, for respondent.

Root, J.—Appellants purchased from respondent a stallion for the sum of \$1,400, giving \$100 cash and their promissory notes for \$700 and \$600, secured by a real estate mortgage. Appellants claim that the horse was sold upon a verbal warranty which failed. Respondent brought this action to foreclose the mortgage. The trial resulted in a decree favorable to appellants. Thereafter a motion for new trial was interposed, argued, and granted. From the order allowing a new trial, this appeal is taken.

¹Reported in 89 Pac. 156.

The motion for new trial was based upon five statutory grounds. Respondent argues that the decree and judgment of the court was not supported by the evidence; that there was misconduct on the part of the defendants in that they produced perjured testimony, to wit, the defendant Floyd Ferguson's testimony; and that there was accident and surprise in that plaintiff, who was a resident of Iowa, did not know that the cause had been assigned for trial, and that one Kester who sold the horse in question and was an important witness, was at the time sick in bed and unable to be at the trial. The order does not state upon what ground it was based. The granting of a new trial lies largely in the discretion of the trial court. In the absence of an abuse of discretion, such an order will not be disturbed except in those cases where the reason for the granting of the order is assigned therein or clearly appears and is shown by the record to be erroneous. When the trial court, after hearing all of the evidence, seeing the witnesses, and being familiar with all of the proceedings, is convinced that the verdict or decision is erroneous, or that an injustice has been done, and there is good reason to believe that another hearing would conserve the ends of justice, it becomes its duty to grant such new trial. The record in this case does not convince us that the trial court abused its discretion in making the order appealed from. It is therefore affirmed.

HADLEY, C. J., DUNBAR, MOUNT, FULLERTON, and CROW, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 6681. Decided March 20, 1907.]

THE STATE OF WASHINGTON, *on the Relation of C. C.
Pagett et al., Plaintiff, v. THE SUPERIOR COURT FOR
PIERCE COUNTY et al., Respondents.*¹

EMINENT DOMAIN—PROCEDURE—REVIEW—CERTIORARI. Certiorari lies to review an order adjudging necessity and public use in condemnation proceedings for a county road, as there is no remedy by appeal; the statute of appeals relating to proceedings in eminent domain permitting an appeal only from the award of damages, and Laws 1901, p. 213, allowing an appeal from adjudication of public use being unconstitutional because of defective title.

SAME—SCOPE AND QUESTIONS REVIEWABLE. Whether a use is a public use is a judicial question, and the same is subject to review on a writ of certiorari in condemnation proceedings.

Application filed in the supreme court March 15, 1907, for a writ of review to correct a judgment and order of the superior court for Pierce county, Chapman, J., in condemnation proceedings, adjudging the use of property for a highway to be a public use, and ordering a jury to ascertain the amount of damages for the taking thereof. Granted.

Titlow & Huffer, for relators.

H. G. Rowland, for respondents.

FULLERTON, J.—On December 22, 1906, Pierce county, acting through its board of commissioners, began proceedings in the superior court of that county to condemn certain lands belonging to the relators, for a right of way over which to establish a county road. At the time appointed for the hearing, the relators appeared and demurred to the petition on the ground, among others, that the court was without jurisdiction over the subject-matter of the proceedings. The demurrer was overruled, and a hearing had at which the court adjudged the proposed use of the property to be a public

¹Reported in 89 Pac. 178.

use, that the public interest required the establishment of the road as proposed by the county, that the land sought to be condemned was required and necessary for the road, and entered an order directing a jury to be summoned to ascertain and determine the amount of damages to be paid the relators for taking the property. The relators thereupon applied to this court for a writ of review to correct the judgment and order of the superior court, claiming that the same were either void, or so far erroneous as to require reversal. The application was made upon notice to the county, and the prosecuting attorney appeared and resisted the granting of the writ on the grounds, first, that the relators have a plain, speedy and adequate remedy by appeal, and second, that the matters and things complained of and assigned as errors in the petition for the writ are matters and things not reviewable in this court either by appeal or writ of review.

With reference to the first objection, it is provided by the statute that the county commissioners in the establishment of roads, in cases where the owner of the land does not accept the award the county makes him, shall direct proceedings to procure a right of way to be instituted in the superior court in the manner provided by law for the taking of private property for public use under the statutes of eminent domain, and of course the procedure provided in that statute governs the proceeding in the superior court. In the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, we held that the statute of appeals relating to proceedings in eminent domain permitted an appeal only from the propriety and justness of the amount of damages awarded, and did not permit an appeal from the order of condemnation. In numerous subsequent cases we have held that this order could be reviewed by the writ of review, and to so review it has become the established practice. Our attention is called to the statute of 1901, p. 213, as allowing an appeal from this order, but that statute was held invalid, in *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 68 Pac.

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957, because the object of the act was not expressed in its title. The remedy sought, therefore, is the proper remedy.

As to the second objection, it may be that certain matters are enumerated in the relator's petition and assigned as error which are not subject to review in this court for the reasons asserted by the county, but clearly there are questions suggested by the petition that are reviewable. Without prejudging the case upon its merits, it may be suggested that the question whether the contemplated use of the property is really a public use is made by the constitution a judicial question, notwithstanding any legislative assertion that the use is public, and, certainly, when a court of original jurisdiction makes an order declaring a particular contemplated use of property to be a public use, this court has power to review that order when the question is properly brought before it. But what questions suggested by the relators are reviewable and what of them are not, can best be determined at the hearing upon the merits.

The writ applied for will be granted, returnable in this court on May 1, 1907, at which time the clerk will assign it for argument with the appeal cases from Pierce county at the May, 1907, session of this court. The relators will prepare a printed brief and serve the same on the attorney for the respondents on or before April 17, 1907, and the respondents will have twenty days thereafter to serve and file an answering brief. The hearing ordered for the purpose of assessing the amount of damages to be awarded the relators will be stayed pending the further order of this court.

HADLEY, C. J., MOUNT, ROOT, and CROW, JJ., concur.

[No. 6484. Decided March 21, 1907.]

W. B. VAN SICLEN, *Appellant*, v. B. L. MUIR, *Respondent*.¹

BOUNDARIES—NAVIGABLE WATERS—SHORE LANDS—TITLE. The government meander line of a navigable lake marks the boundary of a grant made prior to the adoption of the constitution only where the same is below high-water mark, and if the meander is above high-water mark, the owner took title to the land to high-water mark.

ESTOPPEL—AFTER-ACQUIRED TITLE. Aid and consent in extending a walk and wires across a certain lot does not amount to an estoppel against the maintenance of the same, as against an after-acquired title in the lands.

LICENSES—USE OF REAL PROPERTY—REVOCATION. Aid and consent in extending a walk and wires across a certain lot amounts to but a license revocable at any time.

NAVIGABLE WATERS—RIPARIAN RIGHTS—LANDS UNDER WATERS. A littoral owner upon a navigable lake having the preference right to purchase the abutting shore lands is entitled to a mandatory injunction against the use of the shore lands by another for access to a house boat moored in front of the land.

SAME—OBSTRUCTION—NUISANCES—ABATEMENT. A littoral owner upon a navigable lake is not entitled to the removal of a house boat moored in front of his property, as an obstruction in navigable water affecting his littoral rights or as a trespass constituting a nuisance; since only the state can object thereto or bring action to abate such a nuisance.

PUBLIC LANDS—LANDS UNDER WATERS—OWNERSHIP. The shore lands on Lake Washington belong to the state, under the act of Congress admitting the state, which so declared as to the shores and beds of all navigable rivers and lakes up to and including the line of ordinary high water, and under Laws 1897, p. 730, § 4, declaring shore lands to be "lands bordering on navigable lakes and rivers below the line of ordinary high water and not subject to tidal overflow"; it appearing that the shores of Lake Washington are covered and uncovered by the rise and fall of the waters of the lake.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 5, 1906, upon findings in favor of the defendant, granting an injunction to compel

¹Reported in 89 Pac. 188.

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the removal of an obstruction placed upon a navigable lake, after denying injunctive relief asked for by the plaintiff. Reversed.

Arthur C. Dresbach and F. A. Gilman, for appellant.

Vince H. Faben, for respondent.

FULLERTON, J. — In 1905 the appellant constructed a house boat on the waters of Lake Washington, and in June of that year anchored the same in front of lot 4, in block 74, of Burke's Second Addition to the city of Seattle, some 40 feet from the shore line, in water ranging from 6 to 12 feet in depth. The house boat was used as a dwelling house by the appellant and his family. It was connected to the shore by a floating walk, and from the shore to Lake street, a public street of the city of Seattle, by a walk extending across block 74. The appellant also caused a telephone and electric lights to be placed in the house, the wires for which were stretched from the house across block 74 to Lake street. Subsequent to this time, the respondent purchased block 74, and shortly thereafter demanded that the appellant pay rent for the use he was making of the block, or remove his walk and wires from across the block, and the house boat from in front of the same. The appellant refused to pay rent, whereupon the respondent cut the wires, removed the walk, and erected a fence between the house boat and Lake street near the government meander line. This fence cut the appellant off from access to Lake street, and he brought this action to compel the respondent to remove the obstruction, and to refrain from further interfering with the walk and the telephone and electric light wires. The respondent, answering the complaint, sought a mandatory injunction to compel the appellant to remove the house boat from in front of block 74. The trial court denied the injunction asked for by the appellant, and granted that of the respondent; requiring the house boat to be moved, on the ground that it

unlawfully interfered with the respondent's riparian and littoral rights. '

The appellant suggests two principal reasons why the judgment of the court enjoining him from maintaining the walk and wires across block 74 was wrong. The first is, that block 74 of Burke's Second Addition to the city of Seattle was platted wholly upon shore lands, which then belonged and now belong to the state of Washington, and that, in consequence, the respondent acquired by his purchase of that block no such interest therein as will enable him to maintain an injunction against the use of the property by the appellant. The contention that block 74 lies wholly on shore lands belonging to the state is based on the claim that Lake street, as platted and dedicated, extends below the line of ordinary high water of Lake Washington, and that the line of ordinary high water of the lake was the boundary line of the upland owner who platted and dedicated block 74. But in this state the line of ordinary high water does not always determine the boundary line of the land of an upland owner where his land borders on navigable waters. In grants made prior to the adoption of the constitution, as in the case at bar, it marks the boundary only where the navigable water has not been meandered by the government, or the meander line runs above the line of ordinary high water; where the meander line runs below that line, the meander line itself marks the boundary of the grant to the upland owner. See, *Washougal & La Camas Transp. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74, where the reason for the distinction is stated. Here, while the appellant's evidence does tend to show that the street lies below the line of the ordinary high water of the lake, it as conclusively shows that it lies entirely above the meander line, leaving a strip varying in width from a few inches on the south side of the block to thirty-two feet and more on the north. This strip of land the upland owner could lawfully plat and could just as lawfully convey by deed, and when the respondent purchased

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block 74, he acquired the legal title to this strip, and having that legal title, may control its use.

The second reason is that he anchored his boat in front of block 74 at the respondent's suggestion, and extended the walk and wires across the block with his aid and consent, and that because of this aid and consent the respondent is now estopped from insisting that they be removed. But at that time the respondent had no rights in the premises himself, and it may be well doubted whether his conduct, even if it would have amounted to an estoppel had the respondent then owned the premises, could be urged against an after-acquired title. Aid and consent of this kind, however, do not amount to an estoppel in any case. They at most but confer a license, which can be revoked at any time upon notice. Here notice of revocation was given, and when the appellant refused to remove the walk and wires the respondent had the lawful right to remove them.

The injunction against the use of the shore lands in front of block 74 was also proper. As the respondent owns the upland abutting on these shore lands, and has, by reason of such ownership, the preference right to purchase such shore lands when they are placed on the market for sale, he was, under the rule of the case of *West Coast Improvement Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441, entitled to an injunction against the use made of them by the appellant.

But the right to enjoin the use of the block above the meander line and the shore lands is the extent of the respondent's right. As an upland owner merely he has no riparian or littoral rights in the navigable waters of the lake. These belong to the owner of the shore lands, which at the present time is the state, and it, and it only, can claim that an obstruction placed in such navigable waters is an interference with the riparian and littoral rights following the ownership of the shore lands. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.

We have not overlooked the respondent's contention to the effect that there are no shore lands on Lake Washington, and that the rules applicable to the existence of such lands do not apply. But the contention is without foundation. By virtue of the Act of Congress admitting the state into the Union, the shores and beds of all navigable rivers and lakes, up to and including the line of ordinary high water, became the property of the state; and the state, having title, can declare what portion of such lands shall constitute shore lands and be subject to sale to private parties, so long of course as its acts do not unreasonably interfere with the primary right of navigation. In the exercise of this power, the legislature has declared shore lands to be "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow." Laws 1897, p. 230, § 4. While this description is not definite where harbor lines have not been established, since it does not define the water boundary of the lands, it would certainly include all lands lying between the boundary line of the upland and low water, and may include the land lying between such boundary line and water of sufficient depth for ordinary navigation. Either definition, however, is sufficient for the purposes of this case, as the evidence shows there are lands on the shores of Lake Washington that are covered and uncovered by the rise and fall of the waters of the lake.

The respondent seems also to lay stress upon the fact that the appellant is a trespasser on the navigable waters of the state, and that the court can for this reason require the removal of his house boat as a nuisance. It may be that, upon the suit of a proper plaintiff, the court could do this, but the appellant has no such interest in the waters of the lake as will enable him to maintain an action on that ground. Such an action must be maintained by the state, or by some person who is specially injured by the obstruction; a trespasser on state or Federal property does not have to answer for his trespass to the suit of a mere intermeddler.

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The judgment appealed from is therefore reversed, and remanded, with instructions to enter a decree enjoining the appellant from maintaining or attempting to maintain a walk or telephone or electric light wires across block 74 from Lake street to the meander line, and across the shore lands from the meander line to the line of ordinary low-water mark in the lake in front of block 74; and enjoining the respondent from interfering with the appellant's house boat, or his walk or telephone or electric light wires where the same do not touch block 74 or the land lying between high and low water in front of that block. Neither party will recover costs in either the lower or this court.

HADLEY, C. J., ROOT, DUNBAR, CROW, and MOUNT, JJ.,
concur.

[No. 6532. Decided March 21, 1907.]

PATRICK C. HAYES, *Appellant*, v. C. A. KOEPFLI and THE
FIDELITY DEPOSIT COMPANY OF MARYLAND,
Respondents.¹

ATTORNEY AND CLIENT—AUTHORITY—SATISFACTION OF ASSIGNED JUDGMENT. Where, after a judgment for plaintiff has been assigned, an appeal is taken and plaintiff's attorney of record appeared for the respondent on the appeal, he was the attorney for the assignee of the judgment, although paid by the plaintiff, and had authority to receive payment and satisfy the judgment under Bal. Code, § 4766.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 31, 1906, upon sustaining a demurrer to the complaint, dismissing an action to recover money paid to a county clerk in satisfaction of a judgment. Affirmed.

William C. Keith, for appellant.

W. W. Wilshire, for respondents.

¹Reported in 89 Pac. 151.

PER CURIAM.—On September 17, 1900, in the superior court of King county, one M. P. Zindorf recovered a judgment against the Western American Company for \$403.89 and costs of action. On the same day John F. Dore, who was plaintiff's attorney of record, executed in plaintiff's name an assignment of the judgment to the appellant in this action, and filed the same with the clerk of the superior court. Shortly thereafter the Western American Company took an appeal from the judgment and Dore represented the respondent on the appeal. The judgment was affirmed in the appellate court. On the return of the remittitur, the Western American Company paid to the clerk of the superior court the amount of the judgment and costs. John F. Dore, as attorney, received the money from the clerk and satisfied the judgment. The appellant brought this action to recover the money of the clerk and his bondsman, on the ground that Dore, while he was the attorney of the original plaintiff and the attorney for the respondent on the appeal, did not represent the appellant, and was for that reason without authority to take or receive the money paid the clerk in satisfaction of the judgment. To a complaint alleging the foregoing facts, a demurrer was interposed and sustained, and the action dismissed.

We think the court ruled correctly in sustaining the demurrer. By the express terms of the statute, an attorney is authorized to receive payment and acknowledge satisfaction of a judgment obtained for his client. Bal. Code, § 4766 (P. C. § 3188). In this case, if the appellant acquired title to the judgment by the assignment, Dore was his attorney pending the appeal and the subsequent proceedings; and this, notwithstanding he may have been paid by Zindorf, the original plaintiff. Being his attorney, he had the right to satisfy the judgment under the section of the statute cited. Affirmed.

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Statement of Case.

[No. 6512. Decided March 22, 1907.]

OREGON RAILROAD & NAVIGATION COMPANY, *Respondent*,
v. E. J. McCORMICK, *Appellant*.¹

EMINENT DOMAIN—PROCEDURE—JURIES—STATUTES—REPEAL. Laws 1905, p. 270, providing a general method for the selection of juries in superior courts, expressly made applicable "whether in special proceedings or otherwise," and repealing all laws in conflict therewith, repeals the special procedure theretofore existing for summoning jurors in condemnation cases.

APPEAL—RECORD—TRANSCRIPT. The order calling for the issuance of a special jury venire, and records showing the issuance of a venire and selection of a jury from the jurors summoned, are properly part of the record to be certified by the clerk as part of the transcript on appeal without any bill of exceptions or statement of facts.

JURY—RIGHT TO TRIAL BY—WAIVER. Defendant waives a jury by his default and failure to demand the same, under Laws 1903, p. 50.

EMINENT DOMAIN — PROCEDURE — APPEAL — REVIEW. Under Bal. Code, § 5620, providing that, upon waiver of a jury, the issues shall be tried by the court, it is prejudicial error, where defendant in condemnation proceedings has waived a jury by defaulting, to have the damages assessed by a jury which was not selected in the manner provided by law.

SAME—DEFAULT—JUDGMENT. Appeal lies from a default judgment in condemnation proceedings for error in having the damages assessed by a jury not summoned in the manner required by law, without moving to vacate the judgment or having called the same to the attention of the trial court.

SAME—SELECTION BY JURY. Upon default in condemnation proceedings, it is the duty of the petitioner, on moving for a jury to assess damages, to see that the jury is selected in the manner required by law.

Appeal by defendant from a judgment of the superior court for Walla Walla county, Brents, J., entered June 15, 1906, in condemnation proceedings, upon the verdict of a jury assessing damages to property taken for public use. Reversed.

¹Reported in 89 Pac. 186.

Brooks & Bartlett, for appellant.

W. W. Cotton and Lester S. Wilson (Snow & McCamant, of counsel), for respondent.

HADLEY, C. J.—This is a condemnation proceeding. The use for which the petitioner asks the property was adjudged to be a public one. The owner was served by publication summons and made no appearance. A trial upon the question of damages was had before a jury. A verdict was returned, and the court rendered judgment thereon against the petitioner and in favor of the owner for \$375. The owner has appealed from the judgment.

Appellant assigns as error that the trial court caused an open venire to be issued for the summoning of jurors to serve in the cause, and that a jury was impaneled from persons so summoned, rather than from persons selected as provided by chapter 146 of the Laws of 1905. The jurors were selected in conformity with the provisions of Bal. Code, § 5640 (P. C. § 5105), and if that law was in force at the time, the court did not err. It will be observed that the section is a part of the statute upon the subject of eminent domain, and that special procedure is provided for condemnation cases. Appellant contends, however, that the provisions with respect to the selection of the jury are repealed by the later statute, Laws of 1905, page 270 *et seq.*, which provides a general method for the selection of jurors in superior courts. Section 15 of that statute, especially when taken together with § 16, the repealing section, appears to clearly indicate the purpose of the legislature to require all juries in special proceedings, or any other, to be selected according to that act. Section 15 is as follows:

“All juries in any of the superior courts in this state in counties of the first fifteen classes, whether grand or petit and whether in special proceedings or otherwise, shall be selected as in this act provided.”

We see no room for two opinions upon the subject. It is true an act relating to general procedure is ordinarily held

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not to repeal others providing for special procedure, unless it is made clear that such repeal was intended. The intention, however, for the statute of 1905 to supersede all special provisions for selecting the jury is so manifest that it must be held that the provision of § 5640, *supra*, for selecting the jury in condemnation cases, has been repealed.

Respondent has, however, moved to strike from the transcript all matters pertaining to the selection of the jury, on the ground that such matters have not been included in any statement of facts certified by the court. It is argued that with these matters stricken, there is nothing in the record to show that the jury was not selected in accordance with the provisions of the act of 1905. The clerk has certified as a part of the transcript an order calling for the issuance of a special venire in this case; also certain records showing that such a venire was issued and that the jury in the cause was selected from jurors so summoned. The records with reference to the preparation of the jury lists for Walla Walla county under the act of 1905 for the trial of general causes are also certified. If these several records are here so that they may be considered, then it is manifest that the jury that tried this cause was not selected in the manner provided by the act of 1905. This court squarely held, in *State v. Vance*, 29 Wash. 435, 70 Pac. 34, that such records are a part of the records of the court in each case tried by jury, and that, by virtue of their nature and purpose, when they are properly certified by the clerk they will be considered on appeal, independently of any bill of exceptions or statements of facts. The motion to strike must therefore be denied, and it must be held that the record advises us that the jury was not selected in accordance with the law existing at the time.

Inasmuch as appellant did not appear in the action, what are his rights in the premises? He was served by publication, and the record does not disclose whether he had actual notice of the trial or not. In any event, he was served in a manner recognized by law, and he was, therefore, in law before

the court so far as notice was concerned. By his default and failure to demand a jury, he should be deemed primarily to have waived the jury. Laws of 1903, page 50, § 1. In the event the jury is waived, Bal. Code, § 5620 (P. C. §5039), provides as follows:

“In case a jury is waived, as in civil cases in courts of record, in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court.”

When, therefore, appellant waived the jury by his default, he had the right to expect that, if respondent also waived it, the cause would then be tried in the manner provided by the statute quoted above; that is to say, by the court. He had the further right to expect that, if the respondent did not waive a jury, the cause would then be tried by a jury selected in the manner provided by law. It is apparent that his rights in the premises were not observed, and we think that the rights invaded are of such a substantial nature that the failure to observe them should be held to have been prejudicial error.

But respondent says that appellant should have moved to vacate the judgment, or that he should have in some manner brought this question before the trial court, in order to entitle him to a review here. If he had appeared or been present at the trial, it would undoubtedly have been his duty to object to the course pursued in order to have placed him in position to raise the questions here. But since he had the right to rely upon the court to ascertain his damages in the manner provided by law, before his property should be taken through the power of the court's process, he should not now be deprived of the right to a review merely because he was not present to object. This court long since held that a judgment by default is a final one from which an appeal lies as from any other final judgment. *Rhode Island Mtg. etc. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104. Since

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an appeal lies from the default judgment itself, it is not necessary, as respondent argues, that appellant should have moved for the vacation of the judgment. In that event, the appeal would have been from an order refusing to vacate the judgment. But this additional step is not required under the authority of the case cited. The case holds that the appeal may be from the final judgment, and adopting the language of the California supreme court in *Hallock v. Jaudin*, 34 Cal. 167, this court quoted therefrom as follows:

“As to the right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. The former is as much a final judgment as the latter, and the statute gives a right to appeal from all final judgments without distinction. From this it follows that all errors disclosed by the record can be reviewed and corrected on an appeal from the former class of judgments as well as the latter.”

It is probably true that the trial court's attention was not called to the conflict between the statute of 1905 and the former provision in the condemnation statutes with reference to selecting the jury. The selection of the jury under the former statute had been the method but recently in vogue in condemnation cases; and it is not improbable that the point was overlooked by counsel for respondent and that it was not mentioned to the court. The record shows that the jury was called upon the motion of respondent, and it therefore became its duty to see that the jury was selected in a lawful manner. Failing in this, respondent should suffer a reversal of the judgment rather than that appellant's property should be taken without the ascertainment of his damages in the manner provided by law.

The judgment is reversed, and the cause remanded with instructions to grant a new trial upon the question of damages, and to proceed in accordance with this opinion.

ROOT, FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 6469. Decided March 22, 1907.]

ISAAC N. CURTLEY, *Respondent*, v. SECURITY SAVINGS
SOCIETY, *Appellant*.¹

VENDOR AND PURCHASER—FRAUD—REPRESENTATIONS AS TO TITLE. False representations of a vendor as to its title, made with the intent that they be acted on, are as to matters of fact, and may be relied on by the vendee without examination of records showing their falsity.

SAME—DAMAGES—JUDGMENT PAID — EVIDENCE — ADMISSIBILITY — SUFFICIENCY. In an action by a vendee to recover damages for failure of title, including the amount of a judgment recovered against him for breach of his contract to build a house on the property, the judgment and judgment roll are admissible in evidence to prove certain of the issues, although the vendor was not a party or notified to appear and defend; but are not evidence of the grounds on which the recovery was had, or sufficient alone to warrant a recovery for the amount.

SAME—DAMAGES. In an action by a vendee to recover damages for failure of title, evidence that he had paid \$100 for plans for construction of a house does not warrant a recovery for that amount, in the absence of evidence that the plans are of no value except for the particular purpose for which they were purchased.

SAME—FALSE REPRESENTATIONS—KNOWLEDGE OF FALSITY. In an action by the vendee in a quitclaim deed for false representations of the vendor as to the title, it is error to instruct that the vendee could rely on the representations and recover his damages regardless of the fraudulent intent of the vendor in making the representations; as the vendor is liable only if the representations are made with actual knowledge of their falsity, or under such circumstances that the law would impute knowledge.

SAME—DAMAGES—ATTORNEY'S FEES. In an action by a vendee for damages for failure of title, reasonable attorney's fees in defending a suit brought against him are recoverable under circumstances permitting a recovery of the amount of the judgment entered in the action.

SAME—FRAUD—DAMAGES—DUTY TO MITIGATE—EVIDENCE. In an action by a vendee for damages for failure of title, evidence that the

¹Reported in 89 Pac. 180.

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plaintiff had another lot in the vicinity which he might have used to mitigate damages sustained by reason of entering into a building contract, is inadmissible.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 10, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained by a vendee through false representations in a sale of real estate. Reversed.

William E. Richardson and *P. C. Shine*, for appellant.

E. O. Connor, for respondent.

FULLETON, J.—The appellant is a corporation engaged in the business of buying and selling real estate. Sometime prior to March 14, 1904, it procured a tax title to the east 45 feet of lot 10, block 1, of City View Addition to the city of Spokane, and on that day conveyed the property by quitclaim deed to one Robert Abernethy. Thereafter the corporation transcribed its records into new books, and by some oversight, not explained in the record, failed to note the fact that the lot above described had been sold. On January 10, 1905, and after its records had been so transcribed, it changed managers, electing to that position one George Mudgett, who had not theretofore been connected with the business management of the corporation. Mudgett, on April 17, 1905, finding that this lot still appeared on the books of the corporation as its property, on the application of the respondent, caused it to be conveyed to him by quitclaim deed for a consideration of \$35. On May 25, 1905, the respondent entered into a contract with the Cooke-Clarke Co., a corporation, for the erection of a dwelling house upon the lot at the contract price of \$2,400; paying thereon, at the time of its execution, the sum of \$25 and agreeing to pay \$500 on or before July 15, 1905, and twenty-five dollars per month thereafter until the whole of the purchase price should be paid. He also purchased the plans for the house of the same corpora-

tion, agreeing to pay for them the sum of \$100. Mudgett discovered the fact that the property had been previously sold to Abernethy, on June 3, 1905, and immediately sought out the respondent and offered to return to him the purchase price of the lot, with interest and the cost of recording the deed, believing then that the same had been recorded; requesting at the same time that the respondent deed the property to the grantee of Abernethy, that there might be no cloud on Abernethy's title. The respondent refused to settle on this basis, and immediately began this action demanding judgment for \$2,700 damages, filing his complaint on July 10, 1905. The action was then suffered to rest until November 14, 1905, when an amended complaint was filed.

In this amended complaint the respondent set out the transaction substantially as above narrated, and alleged that at the time he purchased the lot Mudgett, with intent to deceive and defraud him, falsely and fraudulently represented that the appellant had a good title to the property, and that its deed of conveyance would convey a good title to the lot to the respondent, and that he relied upon such representations and for that reason did not have the title to the property examined. He further alleged that Cooke-Clarke Co. brought an action against him for breach of the building contract, and recovered judgment against him for the sum of \$447.20, which sum he was compelled to and did pay, together with the sum of \$100 to an attorney for defending the action; that these sums together with \$100 paid for the plans of the house, \$25 paid upon the contract, and \$35 for the lot, aggregated \$707.20, for which sum judgment was demanded. Issue was taken on the allegations of the amended complaint and a trial had, which resulted in a verdict and judgment for the respondent for the full amount demanded.

The appellant at the trial objected to the introduction of any evidence on the part of the respondent, on the ground that the complaint did not state facts sufficient to constitute a cause of action. In support of this contention, the appel-

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lant argues that false representations, to be actionable, must be made under such circumstances as will justify a reasonably prudent person in acting upon them, and since it appeared on the face of the complaint that the representations upon which the respondent relied were made with reference to the title to the property, which was a matter of record accessible to the respondent, he cannot be said to have acted as a reasonably prudent person ought to have acted, since he did not avail himself of the opportunity afforded him to test the truthfulness of the representations, and hence cannot be heard to complain of being defrauded. But the argument is not sound. While this court has, in common with many other courts, held that false representations involving mere matters of opinion, or question of judgment, as much within the knowledge of one party as the other, are not grounds for an action of deceit, it has also held that false representations as to the quantity of land contained in a given description, or false representations as to the boundaries and location of land, or as to its title, if made positively and with the intent that they should be relied upon, were not of that sort, but were actionable if relied upon by the vendee to his injury. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051. Such, also, is the general rule. 14 Am. & Eng. Ency. Law (2d ed.), pp. 24, 88; 29 Id., 654-657; *David v. Park*, 103 Mass. 501.

The reason usually given for the distinction is that representations as to the quantity of land in a given tract, its title, or as to its location on the ground, are representations as to matters of fact, not of opinion, and that representations of a vendor to a vendee as to matters of fact which he knows to be false, and on which the vendee relies to his injury, will sustain an action of deceit even if the vendee might have discovered the fraud by further inquiry; while it is only representations involving matters of judgment or opinion, that do

not afford the remedy of deceit. The complaint, therefore, did not fail to state facts sufficient to constitute a cause of action merely because it alleged that the false representations consisted of matters the truth or falsity of which could have been ascertained by searching the public records.

On the trial the court received in evidence, over the appellant's objections, the judgment and judgment roll in the case brought against the respondent by Cooke-Clarke Co. The appellant insists that this was error for the reason that it was not a party to the action in which the judgment was entered, or notified to appear and defend while the action was pending for trial, and hence is not bound by the judgment. But while the appellant is not bound by the judgment in the sense that it is estopped to question its validity or the justice or legality of the claim upon which it is founded, the judgment was, nevertheless, competent to prove certain of the issues of the case; namely, the fact that such judgment had been rendered, and, in connection with the judgment roll, the fact that it had been rendered in an action brought by the Cooke-Clarke Co. against the respondent for the breach of a building contract entered into between the respondent and the Cooke-Clarke Co. for the erection of a dwelling house upon the lot in question in this action. And this being true, it was not error to admit the judgment in evidence over the general objection made to its admission.

The trial court, however, went farther than this. It held the judgment not only competent evidence of the fact that a judgment had been recovered against the respondent for the cause stated therein, but held also that it was competent evidence of the grounds on which the recovery was had. But the rule is general that strangers to the judgment are exempt from its effects either as evidence or an estoppel; and this is so even as to those persons who are responsible over to the defendant and might have been bound by the judgment had they been notified of the pending action and given an opportunity to appear and defend. This principle was applied

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by this court in the case of *Burkam v. Jamieson*, 25 Wash. 606, 66 Pac. 48. In that case a landlord sought to recover of his tenant the amount he had been compelled to pay to satisfy a judgment obtained against him because of the acts of the tenant and for which the tenant was liable over to him. We held that a complaint which merely set up the fact that the judgment had been obtained for a certain cause did not state a cause of action, but that it was necessary to set up the matters upon which the judgment was founded in an issuable form, inasmuch as the tenant had not been notified of the pendency of the action in which the judgment was obtained and had not voluntarily appeared therein. See, also, *Keene Guaranty Savings Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680; *Landauer v. Espenhain*, 95 Wis. 169, 70 N. W. 287; Black, Judgments, §§ 600, 604; 23 Cyc. 280 and cases cited in note 23. And since there was no evidence of this liability other than the judgment, the appellant was entitled on its request to an instruction taking from the consideration of the jury item of damages.

The respondent offered evidence tending to prove that he had paid one hundred dollars in procuring plans and specifications for the construction of the house he had contracted to build upon the lot in dispute, and the court instructed the jury that this was a proper item of damage for them to consider in making up their verdict. This was error. The respondent was entitled to recover only the actual damages suffered by him, and in order for him to recover for the whole of this item he must show that the plans were worthless for all purposes except for use in constructing the house he had contracted to build but was prevented from building. Plans for a house have a marketable value, and will be presumed to be worth what the purchaser paid for them in the absence of a showing to the contrary. The case of *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457, does not lay down a contrary rule. In that case the plaintiff claimed that the lumber purchased to erect the house there mentioned "became valueless

to him through the breach of the defendant," and the court merely held he was entitled to recover as part of his damages any loss he suffered on account of his purchase of the lumber; it did not hold that he could recover for the lumber in any event, regardless of the question whether or not it had an actual value while in his hands. In this case the respondent, if he establishes the liability of the appellant, is entitled to recover any loss suffered by him because of the purchase of the plans, but he cannot recover the price paid for them unless he is prepared to prove that they have no value whatsoever, and that the price paid for them was a reasonable price.

The trial court instructed the jury in substance that if they found that the appellant, through its manager, before the execution of the deed, actually represented to the respondent that the title to the lot was good and that he need not examine into it, the respondent was entitled to rely on those representations and could recover from the appellant any loss and damage he had suffered by reason of his purchase of the lot directly caused by such representations. In other words, the court ignored the question of the good faith of the representations, holding them actionable if they proved untrue, regardless of the intent with which they were made. But such is not the rule. False representations to be actionable in a case of this kind must be made scienter—that is to say, either with actual knowledge of their falsity, or under such circumstances that the law will imply or impute knowledge, as where representations of material facts are made recklessly, by a person who does not know whether they are true or false, but intends that the person to whom they are made shall rely thereon. But the action is nevertheless one of deceit, which has its foundation in fraud, and fraud either express or implied must be alleged and proved to support it. *Northwestern S. S. Co. v. Dexter Horton & Co.*, 29 Wash. 565, 70 Pac. 59. Were this not so, there could be no virtue in a warranty clause in a deed, as it would always be possible

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to show a warranty, even though the grantor may have expressly refused to warrant his title. The reason for the rule, moreover, is made more apparent when we consider the nature of a deed. A deed, executed in good faith, like any other written instrument, merges all the prior stipulations and agreements of the parties, and their rights thereafter rest solely on the stipulations contained in it; and the rule applies to the warranty clause the same as it does to any other clause. A party may not, therefore, accept a quitclaim deed as a performance of an executory contract to convey land, and, after failure of title, show by parol that the vendor in fact warranted the title. His rights in that regard are measured by the stipulations contained in the instrument, and are neither to be enlarged nor diminished by anything said in good faith while the sale is in process of negotiation. *Devlin, Deeds* (2d ed.), § 850a; *Slocum v. Bracy*, 55 Min. 249, 56 N. W. 826; *Putnam v. Russell*, 86 Mich. 389, 49 N. W. 147; *Cartier v. Douville*, 98 Mich. 22, 56 N. W. 1045. But as the law does not countenance fraud, it allows a recovery where the grantee has been the victim of a fraud—where he has been induced by the false and fraudulent representations of the vendor to accept a conveyance which he would not otherwise have accepted. Hence, as we say, the gravamen of any such action is fraud, and to maintain it fraud must be alleged and proved. The court, therefore, erred in holding that false representations as to the title to land conveyed by quitclaim deed would support an action to recover the purchase price and damages suffered by a reliance upon the title, regardless of the intent with which they were made.

The appellant further contends that it is not liable for the fees paid by the respondent to counsel for defending the action brought against him for a breach of the building contract, but the rule is that reasonable attorney's fees when paid, or contracted to be paid, for defending an action are a part of the damages and are recoverable under circumstances that will permit a recovery of the amount of the

judgment entered in the action. 2 Sutherland, Damages, § 619.

The appellant sought to introduce evidence tending to show that the respondent had another lot in the vicinity of the one in question on which he could have placed his house, and thus avoided breaking his contract with the Cooke-Clarke Co., and the subsequent damages that company recovered against him for the breach. The court refused to permit the showing to be made, and its ruling in that behalf is assigned as error. We think, however, the court ruled correctly. While it was respondent's duty to mitigate his losses as far as possible, that duty did not extend to the extent of requiring him to make a new contract with his builder, or erect a house at a place he did not wish one erected.

For the errors noticed the judgment is reversed and a new trial granted.

HADLEY, C. J., ROOT, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 6320. Decided March 23, 1907.]

PATRICK DESMOND, *Respondent*, v. CARL A. SANDER *et al.*,
Appellants.¹

WATERS—APPROPRIATION—IRRIGATION—OBSTRUCTION OF STREAM—EVIDENCE—SUFFICIENCY. The evidence sustains findings for the plaintiff in an action to restrain the obstruction of a stream used for irrigating plaintiff's lands, where it appears that the waters were appropriated and used by the plaintiff and his grantor since 1868, when defendants' lands were unoccupied, and which were not irrigated until 1884, and that after the defendants had constructed dams, the plaintiff could not irrigate his lands as successfully as before, and the evidence for the defendants fails to satisfactorily sustain their contention that the water they were seeking to collect came by seepage from another source than the stream in question.

¹Reported in 89 Pac. 179.

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Opinion Per Crow, J.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered December 19, 1905, upon findings in favor of the plaintiff, enjoining the defendants from obstructing and interfering with the waters of a creek, appropriated and used for irrigation purposes. Affirmed.

Austin Mires and John B. Davidson (Graves & McDaniels, of counsel), for appellants.

Hovey & Hale, for respondent.

Crow, J.—About the year 1868, one R. A. Maple settled upon the south half of the northeast quarter, and all of the southeast quarter of section 21, in township 18, north, of range 18, east of the Willamette Meridian, now in Kittitas county, and afterwards acquired title thereto. Immediately upon making such settlement he, for irrigation purposes, made an appropriation of the waters of Reeser creek, and afterwards conveyed the land and water right to the plaintiff, Patrick Desmond, who now owns and is in possession of the same. Patrick Desmond and his grantor, R. A. Maple, have, since such original settlement and appropriation, continuously cultivated the above described land, using the waters of Reeser creek to irrigate the same. The defendants Carl A. Sander and Olive Sander, his wife, are the owners and in possession of the northwest quarter of section 22 and the southeast quarter of section 16, in township 18, north, of range 18, east of the Willamette Meridian, lying to the north and northeast of, and adjoining, the plaintiff's land. The defendant Jacob Bowers is the owner of the northwest quarter of section 21, and holds a lease of the southwest quarter of section 16, all in township 18, north, of range 18 E., W. M., lying northwest of and adjoining the lands of the plaintiff.

About the year 1904 a large irrigation ditch, known as the Cascade canal, was constructed some distance north of all of the above described lands, carrying water from the Yakima river and intersecting Reeser creek in its course. For many

years prior to the commencement of this action, the defendant Bowers had irrigated his lands with waters taken from First creek, an independent stream, and in no way connected either with the Cascade canal or Reeser creek. The defendants Sander and wife never cultivated their lands until the year 1904, after the construction of the Cascade canal, from which they then obtained irrigating water. Early in May, 1905, the defendants Sander and Bowers constructed separate dams across Reeser creek on their respective lands and above the lands of plaintiff, for the purpose, as they claim, of catching, storing, and preserving water which they allege is wasted or leaks from the Cascade canal, or comes by seepage through their own lands from the waters received from such canal, or from First creek, and used by them in irrigation. On May 15, 1905, the plaintiff, Patrick Desmond, commenced this action against the defendants, Carl A. Sander, Olive Sander, his wife, and Jacob Bowers, to enjoin them from maintaining such dams, alleging that they were interfering with his use and enjoyment of the waters of Reeser creek, to which he was entitled. On trial judgment was entered in favor of the plaintiff, granting the injunction, and the defendants have appealed.

All of the assignments of error are based on the contention that the trial court erred in making its findings of fact, and in refusing those requested by appellants. It will thus be seen that the controlling questions now before us are questions of fact only. The trial court found that the parties severally own the tracts of land above mentioned; that Reeser creek, a perennial stream, now flows, and from time immemorial has flowed, from a point on Sander's north boundary down through his and Bowers' lands, to and through the lands of the respondent; that said stream flows a large quantity of water which diminishes as the season advances; that its surface channel, at points north of Sander's land, ordinarily becomes dry before the month of June; that after the surface channel has become dry at the points aforesaid, water

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rises at points lower down in the bed of the channel, first upon the lands of the appellants Sander, and after so rising, flows down through the channel to and upon the lands of the respondent; that the quantity of water so flowing is variable, decreasing as the season advances; that in ordinary seasons it flows in sufficient quantities to be used by the respondent during the irrigation season; that during some years it can be used on his land for a later period; that at the time respondent's lands were first settled and the water was used thereon, the lands of the appellants were unoccupied and unfenced; that the first cultivation of the lands of the appellant Bowers was about the year 1884; that the first cultivation of the lands of the appellants Sander was in the year 1904; that the appellants in open court disclaimed any right to the water of Reeser creek; that they had, at various times in the past two years, placed dams in its channel upon their own lands, retarding the natural flow of its water, and have constructed ditches and have diverted such water; that their conduct has interfered with the flow of the water which would otherwise reach the land of the respondent, and which could be used by him in irrigation, and that their conduct has deprived the respondent of sufficient water to properly irrigate and cultivate his land.

These findings are in substantial accord with the contentions of the respondent. The appellants insisted that Reeser creek, from and after the 1st day of May in each year, became entirely dry, save that a small quantity of water stood in low places or pools in its bed, but which was in no way running water and could not flow to the lands of the respondent; that, by reason of the irrigation of the appellant Sander's land from the Cascade canal, and the irrigation of the appellant Bowers' land from First creek, a considerable amount of waste water collected by seepage in the bed of Reeser creek on their lands, creating a small flowing stream; that none of such water came from the upper portion or sources of Reeser creek, which at that time was entirely dry; that

the appellants constructed their dams for the purpose of storing and retaining such seepage water, which belonged to them, and using it in irrigation on their own lands. They disclaimed any right to the waters of Reeser creek, conceding respondent's right thereto, but contended that they did not use the dams until late in the year after the respondent had used all of the waters of Reeser creek to which he was entitled or which he could obtain.

We have carefully examined the evidence and, in the light of the surrounding circumstances, conclude that its preponderance sustains the findings made by the trial court. It unquestionably appears that the respondent and his grantor successfully irrigated their land from the waters of Reeser creek at all times since its original settlement; that the appellants Sander did not irrigate or cultivate their land until about the year 1904, after the Cascade canal was constructed; that although the appellant Bowers has for many years irrigated his land from the waters of First creek, he irrigated the eastern portion thereof for only a part of that time, and that since the construction of these dams the respondent cannot irrigate his lands as successfully as before. We fail to find that the evidence satisfactorily sustains the contention of the appellants that the water they were seeking to collect and use in the bed of Reeser creek came by seepage from their own lands or from First creek, or the Cascade canal.

The findings made by the trial court, which we now adopt, sustain the final judgment, and it is accordingly affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

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Opinion Per Curiam.

[No. 6491. Decided March 23, 1907.]

IN RE CONDEMNATION PROCEEDINGS BY THE CITY OF
SEATTLE.¹

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — BENEFITS—EVIDENCE—SUFFICIENCY—REVIEW. An apportionment by commissioners appointed to assess the benefits to property from a street improvement should not be disturbed because of a variety of opinions held by witnesses, where the evidence in favor of the objections does not overbalance the evidence in support of the return.

SAME—BENEFITS—VALUES. Commissioners appointed by the court to assess benefits may take into consideration the view from the property, if that enhances its value.

Appeal from an order of the superior court for King county, Morris, J., entered June 19, 1906, in condemnation proceedings, confirming an assessment made by a municipality against property benefited through the improvement of a street. Affirmed.

Walter Fulton and Revelle, Revelle & Revelle, for appellants.

Scott Calhoun and O. B. Thorgrimson, for respondent.

PER CURIAM.—The city of Seattle by ordinance provided for extending and improving Lake View Avenue, a street in that city, and directed that the costs of the extension and improvement be taxed to the property benefited. Condemnation proceedings to procure the right of way for the street were prosecuted in the superior court of King county, and that court, after ascertaining the cost of the proceeding, appointed commissioners, as provided by statute, to make and return into court an assessment covering such cost. On the return of the assessment by the commissioners, certain property owners appeared and objected to the assessments made

¹Reported in 89 Pac. 156.

against their properties, assigning various reasons therefor, the principal ones being as follows: That none of the property of the objectors was benefited by the improvement; that the assessment against their property was unjust and unreasonable, being too high; that other property benefited was not included in the assessment roll or otherwise assessed to pay the costs of the improvement; and that the method adopted to arrive at the benefits operated to discriminate unjustly against the objectors' property. A hearing was had by the court on the objections, in which many witnesses were examined and other evidence taken, resulting in an order confirming the assessment. The objectors appeal.

The questions suggested by the objections cited, it will be noticed, are principally questions of fact, and questions, moreover, which are incapable of solution with mathematical exactness, and into which the judgment and opinion of the individual or individuals who undertake their solution must largely enter. It is not difficult, therefore, to find persons who will take issue with the judgment of the persons who make the assessment, and who will testify to the incorrectness of the assessment as returned. The record in this case discloses a variety of opinions, but we do not think the evidence in favor of the objections overbalances the evidence in support of the return.

The contention that the method adopted to arrive at benefits operated unjustly against the appellants is without merit. It is based on an answer made by one of the commissioners to the effect that, in arriving at the value of the several properties, they took everything into consideration, even the view from the property. But if the location of the property enhances its value, this was a circumstance entitled to be taken into consideration in determining what proportion of the costs of the improvement the property should bear, when comparative values are in consideration in making that determination.

The order appealed from is affirmed.

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Citations of Counsel.

[No. 6552. Decided March 23, 1907.]

W. H. WEAVER, *Respondent*, v. MONTANA STABLES,
Appellant.¹

LIVERY STABLE KEEPERS—FIRES—CARE OF HORSES—QUESTION FOR JURY. In an action against a livery stable keeper for the loss of horses destroyed by fire, the question whether the defendant exercised ordinary care in guarding against fires, is for the jury, where it appears that the barn was in a peculiarly exposed position, that the stalls were so located as to make it difficult to extricate horses in case of fire, that defendant had no employee whose duty it was to guard against fires, and that the only employees in the barn on the night of the fire were engaged in their duties so far from the scene of the fire as not to discover it until the alarm was given and the fire so far advanced as to make it impossible to release any of the horses in the part of the barn where plaintiff's horses were kept; since reasonable minds might differ upon the question.

SAME—INSTRUCTIONS. In an action against a livery stable keeper for the loss of horses destroyed by a fire, a requested instruction to the effect that the defendant would not be liable if the fire was started by a third person is properly refused, where the same is in effect given with the qualification "unless by the exercise of ordinary care on the part of the defendant" the horses could have been saved notwithstanding the fire.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 19, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the value of horses lost through the burning of defendant's livery stable. Affirmed.

Brown, Leehey & Kane, for appellant, contended, *inter alia*, that it was error to instruct the jury as to the negligence of the defendant when there was no evidence of any negligent act by it. *Miles v. Douglas*, 34 Conn. 393; *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635; *East Line R. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. 753; *Holt v.*

¹Reported in 89 Pac. 154.

Spokane etc. R. Co., 3 Idaho 703, 35 Pac. 39; *Markland v. McDaniel*, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96; *Harrison v. Cachelin*, 27 Mo. 26; *Jonas v. Field*, 83 Ala. 445, 3 South. 893; *Missouri Pac. R. Co. v. Platzner*, 73 Tex. 117, 11 S. W. 160, 15 Am. St. 771, 3 L. R. A. 639; *Arkridge v. Atlanta etc. R. Co.*, 90 Ga. 232, 16 S. E. 81; *Swank v. Nichols' Adm'r*, 24 Ind. 199; *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Hutchins v. Hutchins*, 98 N. Y. 56. The plaintiff assumed the risks incident to the location with respect to fires. *Knowles v. Atlantic etc. R. Co.*, 38 Me. 55, 61 Am. Dec. 234; *The William*, 6 Chr. Rob. (Eng. Adm.) 316; *Hobson v. Woolfolk*, 23 La. Ann. 384; *St. Paul etc. R. Co. v. Minneapolis etc. R. Co.*, 26 Minn. 243, 37 Am. Rep. 404; *Henderson v. Bessent*, 68 N. C. 223; *Russell v. Koehler*, 66 Ill. 459; *Seymour v. Brown*, 19 Johns. 44; *Meridan Fair etc. Ass'n v. North Birmingham St. R. Co.*, 70 Miss. 808, 12 South. 555; *Slaughter v. Green*, 1 Rand. (Va.) 3, 10 Am. Dec. 488. A presumption of negligence does not arise where a bailee takes the same care of the property of others as he does of his own. *First Nat. Bank of Carlyle v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49.

Aust & Terhune, for respondent.

FULLETON, J.—The appellant is engaged in the business of conducting a livery stable in the city of Seattle. In October, 1905, it received from the respondent five certain horses, which it engaged to keep, board, and groom for the consideration of twenty dollars per month each. On the night of December 24, 1905, the barn in which the horses were kept burned, suffocating, with several others, the five horses belonging to the respondent. The respondent brought this action to recover the value of the horses, alleging in his complaint that they were suffocated because of the negligence of the appellant. The case was tried before the court and a jury, and resulted in a verdict and judgment for the respondent.

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At the close of the trial, the appellant challenged the sufficiency of the evidence to support a verdict for the respondent, and the first error assigned is the ruling of the court refusing to sustain the challenge. The appellant contends that its contract with the respondent, being for their mutual benefit, bound it to take only ordinary care of the property, or that degree of care which a person of ordinary prudence usually takes of his own property under similar circumstances, and that there was no evidence that it did not take such ordinary care of the horses. But, without reviewing the evidence in detail, we think it presented a question for the jury. The evidence introduced on the part of the respondent showed that the livery barn was situated in a crowded district; that it was partially under a Japanese lodging house where fires were maintained; that nearby was a Chinese laundry; that just across the alley, and in close proximity, was a paint shop; next to that a resort or place for smoking opium; and next a Chinese restaurant. As one of the witnesses stated, "the neighborhood was a peculiar one; there were Japs and Chinese and Africans living in the immediate vicinity, all mixed together," exposing the barn to the trespasses of the homeless and dissolute class who desired a temporary lodging. Testimony was offered, also, tending to show that the manner in which the barn was constructed and the location of the stalls in which the horses were kept was such as to make it extremely difficult to extricate the animals in case of fire. With surroundings such as these, the appellant had no employee or assistant whose particular duty it was to guard against fires. While two of its employees were in the barn on the night the fire occurred, they were engaged in duties so far remote from the scene of the fire as not to discover it until the alarm was given by persons not connected with the barn, and until it was so far advanced as to make it impossible to release any of the animals in that part of the barn where the respondent's horses were kept. What degree of care amounts to ordinary care depends upon the circum-

stances of the given case. Much greater vigilance in guarding against fires is required where the barn is in an exposed situation than is necessary where the danger from outside sources is remote or nonexistent. The question of what constitutes ordinary care must then generally be one of fact. It must be one of fact in all cases where the evidence is contradictory, or more than one inference can be drawn from the facts admitted or proved. In the case at bar, it seems to us that it must have been foreseen that a fire would at some time inevitably result from the surrounding conditions; and whether the appellant sufficiently guarded against the happening of that event was so far doubtful that reasonable minds might reasonably differ upon the question. This being so, the question was for the jury, and the court did not err in submitting it to them.

The appellant requested the following instruction:

"The starting of a fire by the negligent act of some third person not under the control and without the knowledge of the defendant would not bind the defendant to any responsibility for the plaintiff's losses."

The court gave the following:

"The defendant in this case could not be held liable unless the loss of the horses was caused by the failure of the defendant company to exercise the ordinary care which I have said the law requires it to exercise, and if you should find from the evidence that the horses in this case were destroyed in consequence of fire which was not started by the defendant through any act of negligence on its part, or through any act of negligence on the part of any of the servants of the defendant entrusted with the care of this stable—I say, if you should find the horses were destroyed by a fire for the starting of which the defendant was not responsible, then the plaintiff cannot recover unless you are satisfied by the evidence that, by the exercise of ordinary care on the part of the defendant company, the horses would have been saved, notwithstanding the fire."

The appellant excepted to the refusal to give the requested instruction and to the instruction given, but we find no error

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in the ruling of the court. The requested instruction was embodied in the instruction given, and the instruction given correctly stated the law.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 6256. Decided March 23, 1907.]

C. W. WALDRON, *Appellant*, v. T. LYNN *et al.*, *Respondents*.¹

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 10, 1906, upon the verdict of a jury rendered in favor of the defendants, in an action for a conversion. Affirmed.

Crites & Romaine, for appellant.

Fairchild & Bruce, for respondents.

PER CURIAM.—Prior to and on February 27, 1902, the plaintiff, C. W. Waldron, was the owner of two frame buildings located on a certain lot in the city of Bellingham, which belonged to the defendants T. Lynn and T. W. Lane. The plaintiff had for some time held a lease to the lot, which was about to expire on February 28, 1903. About this time a dispute arose as to the ownership of the buildings, and the plaintiff attempted to remove or destroy the same. Thereupon the defendants Lynn and Lane instituted an equitable action in the superior court of Whatcom county, and obtained an order enjoining Waldron from so destroying or removing the buildings. Final judgment was entered by the superior

¹Reported in 89 Pac. 153.

court in favor of Lynn and Lane, but upon appeal to this court such judgment was reversed. *Lynn v. Waldron*, 88 Wash. 82, 80 Pac. 292. This action was afterwards instituted by the plaintiff, C. W. Waldron, to recover from the defendants Lynn and Lane the value of the buildings in dispute, which the plaintiff alleged had been converted by the defendants to their own use. Upon trial the jury returned a verdict in favor of the defendants, and from a final judgment entered thereon, this appeal has been taken.

The appellant has presented numerous assignments of error, which in substance involve the contentions that the trial court erred, (1) in rulings on the admission or exclusion of evidence, (2) in commenting on evidence in the presence of the jury, and (3) in its instructions to the jury.

We do not deem it necessary to enter upon a detailed discussion of these various assignments. Having carefully examined the entire record, including all of the evidence, we find that they are without merit; that the rulings of the trial court upon the evidence were properly made; that the instructions were fair, impartial, and free from error; and that no improper comment upon the evidence was made in the presence of the jury. The entire record shows that the controlling and material issues in this case were the following questions of fact: (1) Did the defendants convert the buildings of the plaintiff to their own use, as alleged in the amended complaint; and (2) if such conversion occurred, what damage, if any, was sustained by the appellant. Upon these issues the evidence was voluminous and in sharp conflict. All of the facts and the circumstances surrounding the parties were fully detailed by the witnesses for the appellant and, also, the respondents. Upon the evidence thus submitted, the jury, under proper instructions given them by the court, resolved these issues in favor of the defendants, and we find no prejudicial error in the record which would warrant us in disturbing their verdict or the final judgment entered thereon.

The judgment is affirmed.

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Opinion Per MOUNT, J.

[No. 6531. Decided March 25, 1907.]

J. C. FRIENDLY, *Appellant*, v. NATIONAL SURETY COMPANY
et al., *Respondents*.¹

PRINCIPAL AND SURETY—RELEASE OF SURETY—BUILDING CONTRACTS—CHANGE OF PARTIES. A surety company guaranteeing the faithful performance of a building contract by a copartnership is released from liability, where the owner, without the consent of the surety company, released one of the members of the copartnership and consented to his assignment of his interest to a copartner.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 6, 1906, in favor of the defendant surety company, after a trial on the merits before the court without a jury, in an action for the breach of a building contract and to recover upon a bond guaranteeing the faithful performance thereof. Affirmed.

Ballinger, Ronald, Battle & Tennant, for appellant.

E. C. Macdonald, Chas. A. Riddle, and Donald F. Kizer, for respondents.

MOUNT, J.—The plaintiff brought this action to recover against the defendants Ireland, Clark, and Thomas, copartners, for a breach of contract to construct a building for plaintiff in the city of Seattle, and also against the National Surety Company as surety on a bond for the performance of the contract. The surety company, in answer to the complaint, alleged, among other defenses, that it had been released as surety before any liability had accrued under the contract. At the trial the court sustained this defense and refused to enter judgment against the surety company. The plaintiff appeals from that part of the judgment.

Many questions are presented on the appeal, but in view of the conclusion we have reached upon the merits of this

¹Reported in 89 Pac. 177.

defense, it is unnecessary to consider any other question. The facts, as shown by the record and found by the court, are that on July 8, 1903, the defendants Ireland, Clark, and Thomas, as copartners, entered into a contract with the appellant to construct for him an apartment house in Seattle for the sum of \$8,000. On July 20, 1903, the respondent National Surety Company, at the instance of the copartnership, became surety in the sum of \$3,000, and guaranteed the faithful performance of the contract. Thereafter on the 31st day of July, 1903, before any work was done upon the building, Mr. Thomas agreed to withdraw from the copartnership and to assign his interest in the contract to one of the other partners, provided he was released by appellant from all obligations under the contract. The appellant thereupon consented to the assignment by Mr. Thomas of his interest in the contract, to his partner, and in writing released Mr. Thomas from further liability on the contract. Thereafter Mr. Thomas, for value, assigned his interest to Mr. Clark, one of the partners, and retired from the copartnership, and did not thereafter participate in the contract in any way. The surety company had no notice of the release of Mr. Thomas until a day or two later, and then refused to ratify the release.

Appellant argues that these findings are not sustained by the evidence, and that the release of Thomas by the appellant was upon condition that the surety company should consent to it, and that when the surety company refused to give its consent to the release of Thomas, such release never became effective. But after carefully reading the evidence, we are convinced that the release was made unconditionally and probably without thought of the effect upon the surety bond; but afterwards when the release had been made and Thomas had sold his interest and retired from the partnership, and the surety company had refused to ratify the release, and after appellant had been advised that the bond was not security for the performance of the contract

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by the new partnership, he then sought to hold the surety company by changing the release and making it conditional instead of absolute, without any notice to Thomas until long after liability had accrued. We have no doubt that the release of Thomas by the appellant released the surety company from any liability for the default of the new partnership, for the rule is that the "surety is only bound to the extent and in the manner and under the circumstances he consented to become liable." Brandt, Suretyship and Guaranty (2d ed.), §§ 118, 119; 27 Am. & Eng. Ency. Law (2d. ed.), p. 459; *London etc. Ins. Co. v. Holt*, 10 S. D. 171, 72 N. W. 403; *Standard Oil Co. v. Arnestad*, 6 N. D. 255, 69 N. W. 197, 66 Am. St. 604, 34 L. R. A. 861; *White Sewing-Machine Co. v. Hines*, 61 Mich. 423, 28 N. W. 157; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867.

The respondent became surety for all three of the partners, and probably considered the responsibility of each of them when it entered into the contract. When the application was first made, the surety company might not have consented to become surety for two of the partners without the other. It actually did so refuse before any liability accrued upon the contract. Respondent certainly had a right to make its own contract in its own way, and to stand upon the strict terms thereof. A material alteration, such as changing the contractor without its consent, was not binding upon it. The release of Thomas by the appellant had the effect to make a new contract for which respondents never became liable. Under these facts we are clear that the judgment of dismissal as to the respondent was right.

The judgment is therefore affirmed.

HADLEY, C. J., DUNBAR, CROW, ROOT, and FULLERTON, JJ., concur.

[No. 6525. Decided March 26, 1907.]

W. A. FINN, *Appellant*, v. C. W. YOUNG, *Respondent*.¹

PARTNERSHIP — ACTIONS BETWEEN PARTNERS — FRAUD — SALES OF PARTNERSHIP PROPERTY. In an action between partners for damages for fraud in the sale of partnership property, defendant is liable where, after giving an option on the property and learning from the purchaser that the sale would be consummated, he concealed and misrepresented the amount of the consideration, and stated to the plaintiff that the sale had probably fallen through, and bought out the plaintiff's interests for a much less sum in the name of a friend, on representations that he wished to put more money in the business, which plaintiff was unable to do, agreeing to pay \$500 additional if the sale should be made; although after the sale the plaintiff received the \$500, without knowledge of the true consideration; since the utmost good faith must be observed between partners.

SAME—EVIDENCE OF DAMAGES. In an action between partners for fraud in the concealment of the consideration received in the sale of partnership property, evidence that the property sold for \$35,000, and that the credits due were equal to the debts, is sufficient to show the plaintiff's damages in parting from his interest for a less sum.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 18, 1906, granting a nonsuit at the close of plaintiff's case, in an action between partners for fraudulent representations inducing a sale of partnership property. Reversed.

Fenton & Crews, M. C. Brown, and J. R. Poland, for appellant.

Peters & Powell, for respondent.

MOUNT, J.—At the close of plaintiff's evidence, the trial court granted a nonsuit in this case upon motion of the defendant, and dismissed the action. The plaintiff appeals.

The errors assigned are based upon the ruling on the motion for nonsuit. The evidence on the part of the plain-

¹Reported in 89 Pac. 400.

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tiff shows that, for two or three years prior to 1901, plaintiff and defendant were equal partners, owning a sawmill and other property at Shakan, in the territory of Alaska. The plaintiff resided at Shakan and conducted the business. The defendant spent most of his time in Juneau, Alaska, and Seattle, Washington. In the summer of 1901 both parties concluded that they would sell their interests at Shakan. In August of that year the defendant, Mr. Young, met one J. D. Carroll in Seattle. Mr. Carroll was at that time looking for a location for a fish cannery in Alaska. Mr. Young gave Mr. Carroll a letter of introduction to the plaintiff at Shakan. Mr. Carroll then went to Shakan and met the plaintiff, and after examining the property belonging to the partnership and being satisfied with the location, entered into an optional agreement with the plaintiff to purchase the sawmill and fixtures and equipment, the site, and store and other buildings, for a consideration of \$20,000, and in addition, to pay for merchandise, lumber, and sawlogs on hand at the invoice price thereof. This agreement was to be presented by Mr. Carroll to the defendant at Seattle, and was not to become binding unless approved by the defendant. Mr. Carroll thereupon returned to Seattle and presented the agreement to the defendant, who refused to approve it. At the defendant's request, Mr. Carroll then sent a letter to the plaintiff, informing him that defendant would not approve the contract. This letter was also signed by the defendant.

A few days later, viz., on September 5, 1901, the defendant entered into a contract with Mr. Carroll agreeing to sell the property to him at \$25,000, and in addition thereto, the invoice price of merchandise, lumber, and logs on hand. The option was to extend ninety days from the date of the contract. Six thousand dollars of the purchase price was to be taken in shares of a company which Mr. Carroll proposed to organize. Thereupon Mr. Carroll went to Minnesota and organized a corporation for the purpose of

, taking over the property described in the contract. He kept the defendant advised of his progress and, after the organization of the company, informed the defendant that the company would be ready to make the payments within the time specified in the contract with defendant. The plaintiff was not informed of these transactions after the letter was sent to him by Mr. Carroll as above stated.

Thereafter, in the latter part of October, the defendant went to Shakan, and then for the first time informed the plaintiff that he had entered into a contract with Mr. Carroll, but informed the plaintiff that the terms of this contract were the same as the one he had refused at first to accept, with the exception that the defendant had given Mr. Carroll ninety days' time and had agreed to take \$6,000 of the purchase price in stock. The defendant also stated to the plaintiff that sixty days of that time had already elapsed, and that he had heard nothing from Mr. Carroll; that Mr. Carroll was an adventurer and, in his opinion, would not be able to take up the option. Defendant also stated to the plaintiff that he had concluded not to sell the property, but desired to enlarge the same, and that since the plaintiff had no money to meet the expenses of improvements, defendant had decided to purchase the interest of plaintiff for a friend in Seattle. Defendant then offered plaintiff \$10,000 for his interest. Plaintiff at first refused, for the reason that Mr. Carroll's option had not then expired, and that his share would amount to more than that sum if Mr. Carroll took the property. Thereupon defendant agreed that if Mr. Carroll took the property, he would pay plaintiff \$500 additional. Plaintiff, relying upon the statements made by defendant, that the option with Mr. Carroll was for \$20,000, and that \$6,000 thereof was to be paid in stock, accepted the offer of \$10,000, and transferred his interest to the defendant. Within the ninety days, Mr. Carroll returned to Shakan and took over the property at \$25,000, and the invoice price of merchandise, lumber, and logs, which

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amounted to \$10,000 more, making \$35,000 in all. Before Mr. Carroll had an opportunity to see the plaintiff, the defendant requested him to say nothing to plaintiff as to the terms of the sale. When the transfer had been made to Carroll and his associates, the defendant paid to plaintiff the \$500 as agreed in case Carroll should take up the option. The plaintiff did not learn of the actual consideration passing from Carroll to the defendant until about four years later, when this action was begun for the difference between \$10,500 and \$17,500, one-half of the purchase price from Carroll to the defendant.

Upon these facts, which we must consider as true, we do not hesitate to say that the trial court erred in granting a nonsuit and taking the case from the jury. The rule is that partners must observe the utmost good faith towards each other in all their transactions.

"The same rules and tests are to be applied to the conduct of partners as are ordinarily applicable to that of trustees and agents." 22 Am. & Eng. Ency. Law (2d ed.), p. 115.

"A sale by one partner to another of his partnership interest will not be sustained unless made for a fair consideration and upon full disclosure by the vendee to the vendor of whatever information he has as to the value of such property; and concealment of a material fact by the party whose duty it is to disclose it is sufficient to annul the compact." 22 Am. & Eng. Ency. Law (2d ed.), p. 105.

See, also, *Caldwell v. Davis*, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; *Jennings v. Rickard*, 10 Colo. 395, 15 Pac. 677; *Wright v. Duke*, 36 N. Y. Supp. 853. It was the duty of the respondent to fully inform the appellant of his contract with Carroll, and of the fact that Carroll would, within the ninety days, take up the option and pay the purchase price of \$35,000. He did not do so, but deceived the appellant into the belief that Carroll would be unable to take the property.

Respondent argues that, because the appellant took the \$500 from the respondent after Carroll had paid the money

to respondent, appellant then must have known that Carroll had taken up the option. This is true, but at that time the appellant did not know the amount of money the respondent had received. He then knew only what his partner had previously told him, viz., that the purchase price was \$20,000, less \$6,000 in stock and plus the invoice value of the merchandise, lumber, and logs, which up to that time had not been taken or estimated, but which was found to amount to \$10,000. If this had been the actual consideration which respondent received from Carroll, there would be much force in respondent's contention, but when it is conceded that this was not the actual consideration, but that the contract and payment was \$35,000, respondent's position utterly fails, because the difference between the actual facts and the represented facts is the difference between good faith and fraud. Respondent attempts to sustain the judgment upon the ground that there is no evidence to show that appellant's interests were worth more than the \$10,500 which he received. It was shown that the property was sold for \$35,000, and that the credits due the corporation were equal to the debts. This was sufficient to show the damages claimed.

The judgment is reversed and the cause remanded for a new trial.

HADLEY, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

[No. 6536. Decided March 26, 1907.]

STATE MEDICAL EXAMINING BOARD *et al.*, Respondents, v.
JAMES G. STEWART, Appellant.¹

JUDGMENT — BAR — DISMISSAL AND NONSUIT — EFFECT OF STIPULATION. A dismissal of a proceeding under a stipulation dismissing the same without costs to either party, does not amount to a retraxit, and cannot be pleaded in bar of another action without alleging facts showing a full settlement of the contested points.

SAME—ABATEMENT—MERITS. A dismissal of an action on the ground of the pendency of another action for the same cause, cannot be pleaded as a determination of the merits in a subsequent action.

LIMITATION OF ACTIONS—PHYSICIANS AND SURGEONS—LICENSES—PROCEEDINGS TO REVOKE—RULE OF EVIDENCE. Under Laws 1905, p. 70, providing no limitation, the statute of limitations cannot be pleaded in bar of a proceeding to revoke the license of a physician on the ground of a conviction of an offense involving moral turpitude, under Bal. Code, § 3015, making the same conclusive evidence of unprofessional conduct, as the same is but a rule of evidence to which the statute of limitations does not apply.

Appeal from a judgment of the superior court for Pierce county, Linn, J., entered November 7, 1906, upon sustaining a demurrer to defendant's answer, affirming upon appeal the action of the state medical board in revoking appellant's license to practice medicine. Affirmed.

John E. Humphries and *Geo. B. Cole*, for appellant.

Walker & Munn, for respondents.

MOUNT, J.—On June 16, 1906, the respondent Arntson filed a complaint with the state medical board, seeking to revoke the license of appellant to practice medicine within the state. The complaint alleged that the appellant was guilty of unprofessional and dishonorable conduct, and particularly stated the facts showing a conviction of appellant on September 30, 1903, for an offense involving moral turpi-

¹Reported in 89 Pac. 475.

tude, the facts in regard to which will be found in the case of *State v. Stewart*, 32 Wash. 103, 72 Pac. 1026. The appellant appeared before the board and contested the charges. The board sitting in Pierce county sustained the charges and made an order revoking the appellant's license to practice medicine in the state. The appellant appealed to the superior court of Pierce county. He thereupon filed an answer, not denying the charges in the complaint, but alleging that the same charge had been made against him on July 7, 1904, in Spokane county, and that under said charge the examining board revoked his license to practice medicine, and he thereupon appealed to the superior court of Spokane county; that in July, 1905, while the said appeal was pending in the superior court of Spokane county, another charge of the same offense was filed against him in King county, and that the board there again revoked his license and he thereupon appealed to the superior court of King county; that the said appeal in King county was tried and the superior court of that county dismissed the proceedings, upon the ground that another action for the same offense was then pending in the superior court of Spokane county; that the medical board thereupon appealed from said order to this court; that thereafter, by stipulation, the parties dismissed the actions pending in Spokane county and King county, and the appeal pending in this court; that said dismissals are a bar to the prosecution of this case. The answer then pleads both the two-year and three-year statute of limitations as a bar to the action. The lower court sustained a demurrer to this answer, and the appellant elected to stand upon the allegations of the answer; whereupon a judgment was entered affirming the action of the medical examining board in revoking appellant's license. This appeal is prosecuted from that judgment.

The appellant contends that the dismissal of the cases in King county and Spokane county amounts to a retraxit, and therefore is a bar to any further prosecution of the same

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charge against the appellant. It is no doubt the rule that, where the parties to an action have settled their dispute and agreed to a dismissal, such dismissal is a retraxit and amounts to a decision upon the merits. It is not alleged in the answer, nor is it now claimed, that there was any settlement or agreement of settlement of the controversy between the parties to this action, but appellant maintains that the legal effect of the dismissal by stipulation amounts to a settlement and bar to further prosecution, and cites *Merritt v. Campbell*, 47 Cal. 542, and *Phillpotts v. Blasdel*, 10 Nev. 19, in support of that contention. The authorities are not in accord upon this question, as will be seen by § 33, vol. 1, Van Fleet on Former Adjudication. In *Haldeman v. United States*, 91 U. S. 584, 23 L. Ed. 433, the supreme court of the United States said:

"It is a general rule, that a plea of former recovery, whether it be by confession, verdict, or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it was founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important. They may refer to the costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it."

See, also, *Bishop v. McGillis*, 82 Wis. 120, 51 N. W. 1075; *Butchers' etc. Ass'n v. Boston*, 137 Mass. 186.

We think the rule above stated is the just and proper rule. The action which was brought in King county was tried upon the plea that another action between the same parties for the same cause was pending in Spokane county. That plea was sustained, and for that reason alone the action in King county was dismissed. But that dismissal had no effect upon the issues in the original action then pending in Spokane county. Those issues stood for trial unaffected by the abatement of the action in King county. *Tacoma v. Tacoma Light & Water Co.*, 15 Wash. 499, 46 Pac. 1119; 5 Current Law, p. 2; 1 Cyc. 21; 1 Ency. Plead. & Prac. 776. The dismissal of the King county case was, therefore, not a determination of the cause of action upon the merits, and needs no further consideration. Subsequently the parties stipulated to dismiss the case pending in Spokane county, without cost to either party. There is nothing in the record to show that the case was settled or determined, except the mere fact of dismissal, and this, according to the rule above stated, is not sufficient to constitute a bar. The statute provides that, "An action may be dismissed or judgment of nonsuit entered in the following cases: . . . 2. By either party upon the written consent of the other." Bal. Code, § 5085 (P. C. § 727). "When a judgment of nonsuit is given, the action is dismissed, but such judgment shall not have the effect to bar another action for the same cause." Bal. Code, § 5087 (P. C. § 729). Notwithstanding the case of *Merritt v. Campbell*, *supra*, apparently to the contrary upon statutes similar to ours, we think a written stipulation of both parties stating that, "The above-named cause now pending . . . be dismissed without costs to either party," falls squarely within the statute, and is just as effective to dismiss the action without prejudice as if the stipulation were consented to by one party and signed by the other. We are, therefore, of the opinion that the answer of the appellant was not sufficient to constitute a bar to the action.

Appellant next contends that the cause is barred by the

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statute of limitations. This is a special proceeding prescribed by the provisions of law relating to medicine and surgery. Pierce's Code, § 6284 *et seq.* (Laws 1905, ch. 41). The statute provides that a license to practice medicine may be revoked by the state examining board upon complaint charging unprofessional or dishonorable conduct. And it is provided by Pierce's Code, § 6285 (Bal. Code, § 3015), that a conviction of any offense involving moral turpitude shall constitute unprofessional or dishonorable conduct. Pierce's Code, § 6287 (Bal. Code, § 3017), provides for an appeal from the board of examiners to the superior court of the county in which was held the last general meeting of such board; and also provides that such appeal shall stand for trial *de novo* in all respects as ordinary civil actions, and like proceedings shall be had thereon. No time is limited within which such proceedings shall be commenced. The appellant argues that, because no time is fixed, such actions must be commenced within two years, under the provisions of Bal. Code, § 4805 (P. C. § 289a). It is unnecessary for us to decide the technical question presented whether this is a civil action within the meaning of the statute, because we are satisfied such statute does not apply to this case in any event. The object of the statute was to prevent immoral or dishonorable persons from procuring licenses to practice medicine in this state, and if persons having licenses were found to be unprofessional or dishonorable, then their licenses might be revoked. The character of the person at the time the charge of unprofessional conduct is made controls his right to the license. This character is proved by his conduct in the past. A conviction of any offense involving moral turpitude is made conclusive evidence of unprofessional conduct. It is not contemplated by the statute that the examining board shall try the accused and find him guilty of an offense involving moral turpitude when there has already been a trial and conviction. Such former conviction by a court of competent jurisdiction is conclusive evidence of the moral character and

professional conduct of the accused at the time the charge is made against him. The statute, therefore, constitutes a rule of evidence in such cases, to which the statute of limitations does not apply.

In the case of *Hawker v. People of New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002, the supreme court of the United States, in considering a statute similar to our own, said:

“But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. . . . It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule,—one having no relation to the subject-matter,—but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res adjudicata* and invoking the conclusive adjudication of the fact that the man had violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.”

In addition to the cases there cited, see, also, *In re Lowenthal*, 78 Cal. 427, 21 Pac. 7; *Ex parte Tyler*, 107 Cal. 78, 40 Pac. 33, to the effect that the statute of limitations does not apply in cases of this character.

We conclude, therefore, that the court properly sustained the demurrer to the answer. The judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

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Opinion Per CROW, J.

[No. 6390. Decided March 26, 1907.]

J. J. CROWLEY, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

TRIAL—VERDICT—SPECIAL VERDICT. In an action by a trespasser for personal injuries sustained in being put off a moving freight train, a special verdict finding that the brakeman did not strike the plaintiff and knock him off the side of the car is inconsistent with a general verdict for the plaintiff, where there was no evidence of any other ground of recovery to sustain the general verdict; and it is error to deny defendant's motion for judgment.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 21, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a trespasser while riding upon a freight train. Reversed.

Edward J. Cannon, for appellants.

Robertson, Miller & Rosenhaupt and *John C. Kleber*, for respondent.

Crow, J.—On the morning of July 23, 1904, the plaintiff, J. J. Crowley, and another man, being trespassers, boarded a Northern Pacific freight train at Connell, Washington, for the purpose of traveling to Ritzville or some other station towards the east without the payment of fare. Shortly after leaving Connell, William E. Haight, the front brakeman, accosted them, and after some little conversation, ordered them to leave the train as it was slowly running up grade. The plaintiff's companion alighted without injury, but plaintiff, either while attempting to alight, or by being thrown off, fell and was seriously injured. This action was instituted by him against the defendants, the Northern Pacific Railway Company and William E. Haight, the brake-

¹Reported in 89 Pac. 471.

man, to recover damages. In his complaint as amended at the trial, he alleged that, while he was standing on the side ladder of a box car, the defendant Haight suddenly, without warning, and without the exercise of caution, did recklessly, carelessly, and with great force, strike him so that he was thrown from the train which was then running at a great rate of speed, and sustained the injuries of which he now complains. The plaintiff in his own behalf testified that the defendant Haight hit him upon the head with a lantern and knocked him off the car. He offered no evidence aside from his own, and there is no other showing that he fell from the train by being struck or knocked off. The jury returned a general verdict for \$2,000 in his favor, and also a special verdict, answering an interrogatory propounded to them as follows: "Q. Did the brakeman by a blow from his lantern strike the plaintiff and knock him from the side of the car? Ans. No." The defendant filed a motion for judgment *non obstante veredicto*, upon the ground that, by reason of the answer contained in the special verdict, there was no evidence to sustain the general verdict. This motion was denied, and from a judgment entered upon the general verdict, the defendants have appealed.

The only contention of the appellants which we will consider is, that the trial court erred in denying their motion, in entering judgment for the respondent, and in refusing to enter judgment for the appellants. In support of this assignment of error they contend that, in view of the special verdict, there is no evidence to sustain the judgment. The respondent testified that the brakeman Haight, after first ordering him and his companion to leave the train, struck him when he was clinging to a ladder at the side of a box-car, and thus violently knocked him off. This evidence would be sufficient to sustain the general verdict had no special verdict been returned. By their answer to the special question, the jury have unmistakably shown that they did not accept or believe the above-mentioned statements of the re-

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spondent. In other words, they found that his testimony that Haight knocked him off the car was untrue. This places him in the same position he would have occupied had he offered no evidence whatever in support of his contentions. Were we to eliminate his testimony as being untrue, we would then be unable, after a most careful examination of the statement of facts, to find any showing of negligence on the part of the appellants, or any facts or circumstances that would sustain the general verdict. If respondent is permitted to recover, he must do so in the face of an utter absence of evidence, or upon evidence which the jury, who are the exclusive judges of the credibility of the witnesses, have branded as false. A motion for judgment *non obstante veredicto* may be granted when there is no evidence to sustain the general verdict returned by the jury. *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109.

If such a motion can be granted for the want of evidence, we fail to see why it may not also be granted when there is absolutely nothing to sustain the general verdict other than evidence which the jury, by their special verdict, have refused to credit and stigmatize as untrue. The respondent does not call our attention to any other evidence tending to show wrongful or negligent acts on the part of the appellants, still he insists that the special verdict is not inconsistent with the general verdict and that the trial court properly denied the appellants' motion. He contends that the special verdict is merely a finding evidentiary in its character, and claims the rule to be that, if under any proof that might have been made within the issues, such special finding and the general verdict can be reconciled, the appellants' motion should be denied. In support of this doctrine he cites, with many others, the following cases, mostly from the state of Indiana: *Stevens v. Logansport*, 76 Ind. 498; *Shaffer v. Ryan*, 84 Ind. 140; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Shuck v. State ex rel. Cope*, 136 Ind. 63, 35 N. E. 993; *City of South Bend*

v. Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. 200, 54 L. R. A. 396; *Kerr v. Keokuk Waterworks Co.*, 95 Iowa 509, 64 N. W. 596; *Terre Haute etc. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20.

Having cited these cases, the respondent contends that if, under the issues, there could have been proof of supposable facts, not inconsistent with those specially found, the general verdict must prevail; and that granting the respondent was not knocked from the train by being struck with a lantern, the court in passing on appellants' motion must assume that respondent was thrown off in some other way, if under the issues, proof thereof would have been admissible. In other words, if under the pleadings proof of some other violent method of removing him from the train could have been offered, the court must, in passing upon the motion, assume that such proof was offered, and do so even though the statement of facts affirmatively shows that it was neither offered nor admitted. We cannot announce any such doctrine as the law of this state. The logical result of such a rule would be that a plaintiff could allege different acts of negligence, could offer evidence in support of one only, and if the jury by special verdict found such evidence as to the one alleged act of negligence to be false, but also found a general verdict in the plaintiff's favor, a defendant would be entitled to no relief whatever because, forsooth, the plaintiff had taken the precaution to allege other acts of negligence, in support of which he offered no proof. Such a proceeding would be a travesty on justice instead of an orderly instance of its administration. The question here involved is ably discussed in the recent case of *Awde v. Cole*, 99 Minn. 357, 109 N. W. 812, in which, after referring to, and quoting from, the case of *Stevens v. Logansport*, 76 Ind. 498, cited by the respondent, the supreme court of Minnesota says:

"To such an extreme view, we are unable to give our assent. Naturally, the issues of a particular controversy, whose merits are sought to be determined by a motion *non*

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obstante veredicto, are the issues actually litigated on trial. It is not strictly necessary that they should have been appropriately pleaded in the first place; a court might amend the original pleadings so as to conform the actual proof and direct judgment accordingly. *Per contra*, specific grounds for liability controverted by pleadings may be, on trial, completely eliminated from the case; they may be waived expressly or impliedly by practical abandonment or by failure of proof. A general verdict must be based on the issues formulated by the charge, based necessarily upon proof and ordinarily upon the pleadings. Properly it can cover no more and should cover no less. When special verdicts also are rendered on all such issues, the general verdict, if inconsistent with them, must fail. No valid reason of logic or convenience, however, is suggested for sustaining the general verdict because some basis of liability controverted in the pleadings and eliminated on trial was not made the subject of a special finding."

If the respondent was not knocked from the car by a blow of the lantern, then the proof herein is a complete blank. He has established no other fact which justifies a recovery, He made no claim that he was struck, beaten, or assaulted in any other manner; yet his counsel now contend that the general verdict must stand as the pleadings were sufficiently broad to have permitted such evidence, or evidence that the brakeman kicked him off, struck him off with a club, or threw him off by main force. Respondent offered no such evidence, nor does he now dispute the appellants' contention that there was not one particle of proof authorizing a recovery, except his statements which the jury have rejected as unworthy of credit.

The honorable trial court erred in overruling the appellants' motion for judgment *non obstante veredicto*. The judgment is reversed, and the cause remanded with instructions to sustain the motion and to enter a judgment dismissing the action.

HADLEY, C. J., DUNBAR, MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 6602. Decided March 26, 1907.]

SEATTLE & NORTHERN RAILWAY COMPANY, *Respondent*, v.
ANNE C. BOWMAN *et al.*, *Appellants*, UNION
WHARF COMPANY, *Defendant*.¹

APPEAL—DECISIONS REVIEWABLE—AFFECTING SUBSTANTIAL RIGHTS. Orders sustaining a demurrer to a complaint in intervention and denying leave to amend the complaint are not appealable as orders affecting a substantial right which in effect determine the proceeding or discontinue the action (FULLERTON, J., dissenting).

Appeal from orders of the superior court for Skagit county, Joiner, J., entered May 22, 1906, sustaining a demurrer to a complaint in intervention and denying leave to amend the same. Dismissed.

Frank Quinby, for appellants.

L. C. Gilman (*B. O. Graham*, of counsel), for respondent.

ROOT, J.—This action was originally brought by respondent against the defendant wharf company. Subsequently the appellants asked, and were granted, permission to file a complaint in intervention. To this complaint a demurrer was interposed and sustained. Appellants then asked permission to amend their complaint by adding thereto a new paragraph which was set out. This motion was by the court denied. An order sustaining the demurrer and one denying leave to amend the complaint in intervention were signed and entered by the court. No judgment was ever entered. From the orders mentioned, this appeal is taken.

Respondent moves to dismiss the appeal upon the ground that neither of said orders is appealable. Appellants, in their reply brief, admit that the order sustaining the demurrer was not appealable, but contend that the order denying leave to amend the complaint in intervention is appealable. They

¹Reported in 89 Pac. 399.

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base their right to appeal upon subdivisions 6 and 7, Bal. Code, § 6500, which are as follows:

"6. From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; . . .

"7. From any final order made after judgment, which affects a substantial right; . . ."

We think this was not a final order. It did not "prevent a final judgment" nor necessarily "discontinue the action." Appellants had intervened. Their complaint had been held insufficient upon demurrer. They sought by a motion permission to amend. This permission was denied. They had the privilege of standing upon their original complaint, or of asking to have it amended in some different manner, or perhaps could have proceeded in some other way. The order of the court did not necessarily terminate their rights. This could have been done only by a judgment of dismissal, or some order or proceeding equivalent thereto. This and other courts have repeatedly held such orders to be nonappealable. In *State ex rel. Small v. Fleming*, 37 Wash. 531, 79 Pac. 1115, this court said:

"The respondents move to dismiss the appeal in this case upon the ground that the same is taken or sought to be taken from an order sustaining a demurrer to appellant's complaint. This court has repeatedly held that such an order is not appealable. *Potvin v. McCorvey*, 1 Wash. 389, 25 Pac. 330; *Olsen v. Newton*, 3 Wash. 429, 30 Pac. 450; *Mason County v. Dunbar*, 10 Wash. 163, 38 Pac. 1003; *Padley v. Gregg*, 26 Wash. 322, 67 Pac. 72. The motion must be granted, and the appeal is hereby dismissed."

In *Flannigan v. Lindgren*, 122 Wis. 445, 100 N. W. 818, the supreme court of that state used this language:

"It is entirely plain that the order submitted to us for review is not within the appealable class. It is not even claimed to fall within any except the first subdivision of section 3069, Rev. St. 1898: 'An order affecting a substantial

right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.' But while it may affect a substantial right, and while the views of the court expressed as a reason for the order may be conclusive of the action, this order does not determine the action, for it still pends; nor does the order prevent a judgment from which an appeal may be taken, for the logical result of the views expressed by the court would be a judgment dismissing the writ, from which, of course, this present appellant could take his appeal and review all questions which could arise upon the present order. *St. Pat. Cong. v. Home Ins. Co.*, 101 Wis. 155, 76 N. W. 1125; *In re M. & N. R. Co.*, 103 Wis. 191, 78 N. W. 753; *Maynard v. Greenfield*, 103 Wis. 670, 79 N. W. 407; *Mills v. Conley*, 110 Wis. 525, 86 N. W. 203; *Benolkin v. Guthrie*, 111 Wis. 554, 87 N. W. 466. Appeal dismissed."

See, also, *Wiesmann v. Shanley*, 124 Wis. 431, 102 N. W. 932; *Havens v. Stewart*, 7 Idaho 298, 62 Pac. 682; *Owen v. McCormick*, 5 Mont. 255, 5 Pac. 280; *Hanley v. Board of Commissioners*, 87 Minn. 209, 91 N. W. 756.

Under the rule and practice heretofore established, we are constrained to dismiss the appeal.

HADLEY, C. J., RUDKIN, DUNBAR, MOUNT, and CROW, JJ., concur.

FULLERTON, J. (dissenting).—The order of the court refusing the intervener leave to amend after sustaining a demurrer to the complaint in intervention determined the action in so far as the intervener was concerned, and is appealable under the express language of the statute. Laws 1901, page 28, sub. 6, (2). It is of no consequence that a formal order of dismissal was not entered. It is the effect of the order that renders it appealable—not the form it takes. When therefore the court made an order that effectually cut off the intervener from any further participation in the case his right of appeal accrued. For these reasons I am constrained to dissent from the order of dismissal.

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[No. 6616. Decided March 26, 1907.]

THE CITY OF SPOKANE, *Respondent*, v. M. PATTERSON,
Appellant.¹

EVIDENCE—MAPS—ADMISSIBILITY. A map upon which a witness designated the location of objects is admissible in connection with his testimony where it is reasonably accurate.

MUNICIPAL CORPORATIONS—POLICE POWER—ORDINANCES—BLASTING. An ordinance prohibiting "blasting" applies to shots so arranged as to make a chamber at the bottom of the drilled hole, technically called a "spring" shot as distinguished from a stronger charge called a "blast," where it appears that the former hurls pieces of rock a great distance and produces the commonly understood effect of blasting.

SAME—MASTER AND SERVANT—TORTS OF SERVANT—CRIMINAL RESPONSIBILITY OF MASTER. An employee is guilty of violating an ordinance prohibiting blasting unless the same is properly covered, although the act was done by his servant contrary to his orders and when he was not present, where the general work of blasting was being done by his authority; since the same is a police regulation in which the element of intent is unessential.

SAME—PARTNERSHIP—CRIMINAL RESPONSIBILITY OF PARTNERS. It is immaterial that one found guilty of the violation of an ordinance prohibiting blasting was a member of a partnership carrying on the work, or that others with him jointly committed the offense.

Appeal from a judgment of the superior court for Spokane county, Huneke, J. entered September 25, 1906, upon a trial and conviction of the violation of a city ordinance relating to blasting. Affirmed.

Geo. W. Shaefer, for appellant.

J. M. Geraghty and *Lester P. Edge*, for respondent.

HADLEY, C. J.—The defendant in this cause was charged in the police justice court of the city of Spokane with violating an ordinance of said city relating to blasting, in that he

¹Reported in 89 Pac. 402.

unlawfully discharged a blast without having the same securely covered so as to prevent danger to persons and property. On appeal to the superior court, the cause was there tried before a jury, a verdict of guilty was returned, judgment was entered that the defendant shall pay a fine of \$100 and costs, and he has appealed. An ordinance of the city of Spokane provides as follows:

"SEC. 4. In all cases of blasting rock or stone within the city of Spokane, each blast, before firing it, shall be securely covered with chain aprons, brush or other materials, to be placed over and around such charge in such manner that all danger to persons and properties shall be absolutely prevented." Ordinance No. A24, § 4.

There was sufficient evidence for the jury to find that the ordinance was violated in the arrangement of the blast in question. But appellant denies his own liability to punishment for the reason that he did not personally place and discharge the blast. It was done by his employee, and he claims that the failure to properly cover the blast was without his knowledge and against his instructions.

The first error assigned is that the court permitted respondent to introduce in evidence a certain map for the purpose of showing the location of the blast. The objection is on the ground that it was not definitely shown where the man said to have been injured was located, and also, that neither the location of the blast nor who discharged it had been sufficiently shown. We think there was sufficient evidence upon these subjects, and that it appeared from the testimony that the map was reasonably accurate. The locations were designated upon the map by pencil marks made by a witness in the presence of the court and jury. The map was offered in connection with the testimony, and it was therefore proper to admit it as an aid to the court and jury.

"It is the common practice in the courts to receive private or unofficial maps, diagrams, models, or sketches for the pur-

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pose of giving a representation of objects and places which generally cannot otherwise be as conveniently shown or described by witnesses, and when proved to be correct or offered in connection with the testimony of a witness they are admissible as legitimate aids to the court or jury." 17 Cyc. 412.

Several assignments of error relate to instructions of the court in relation to blasting and "springing." Appellant contends that a distinction should have been observed; that a "spring" shot is so arranged that it simply makes a chamber at the bottom of the drilled hole, while a blast proper is a stronger charge, and both tears and throws the earth and rock. It is contended that this was arranged for a spring shot, and that the provision of the ordinance covers only blasts. To the layman this appears to be a somewhat technical distinction when the purpose of the ordinance is considered. It was manifestly intended to protect persons against danger from discharges of powder or other explosives within the city limits when applied to the commonly understood purpose of blasting; that is to say, to the tearing or jarring loose of rock, earth, or other material. There was testimony that this shot burst forth from the hole, and that pieces of rock were hurled a great distance. It would therefore seem to be immaterial by what name it was called, since it was so adjusted that the effect produced was that which comes from blasting. The court did not err in this particular.

Several assignments of error are comprehended by the objection to the following instruction, which was given to the jury:

"If you believe from the evidence beyond a reasonable doubt that* the time the blast was discharged the man Miller actually discharged the same, was in the employ of the defendant, and was engaged by the defendant for the purpose of doing blasting, and was acting with the scope, within the course of his employment, even though the defendant did not authorize Miller to discharge said blast without having the same properly covered so as to render the same harmless to the public, and even though Miller disobeyed the defendant

in discharging the blast, you must find the defendant guilty as charged in the complaint."

The above presents the principal point in the case, viz., can an employer in any case be made criminally liable on account of the neglect of his employee, when he has not consented thereto and when he may even have instructed a different course. The evidence in the case shows that appellant was engaged in work about the place and in connection with loading and hauling the blasted and quarried rock, although he was at some distance from the blast itself. He was a principal, and the work was being done as a part of the business he was there conducting. Although he was not immediately present, yet the general work of blasting at that place was being done under his general supervision, by his agents and by his authority. Is it material, therefore, that he may have instructed that the blast be covered? In volume 1, Am. & Eng. Ency. Law (2d ed.), page 1161, appears the following statement of the general principle:

"The principal is in general not liable *criminaliter* for the act of his agent unless it is committed by his command or with his assent."

In the notes, however, the exceptions to the rule as stated in the above text are specifically mentioned, and cases are cited in support thereof. The exceptions involve cases arising under police regulations. The ordinance in question is purely a police regulation. It has been often held that where a saloon is open or liquors are sold in violation of a statute or ordinance, the owner is guilty of the offense although he is not present, has no knowledge of it, and has given instructions to the contrary. This court approved that rule in *State v. Constantine*, 43 Wash. 102, 86 Pac. 384. In that case we quoted from the opinion in *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, where Chief Justice Cooley made the statement, in effect, that many statutes are in the nature of police regulations and impose penalties without regard to any intention to violate them, in

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order to insure a degree of diligence for the protection of the public that will render violation practically impossible. In the case of *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103, 28 Am. St. 698, 15 L. R. A. 694, there is a general discussion of this question, and it is there shown by the authorities that the intention is immaterial in this class of cases; that it is the duty of a principal to trust no one to do his work but such as he can safely trust to discharge his whole duty when such police regulations are involved by his work, and that if he does not do so, the law holds him answerable for the penalty. It is shown that one cannot, by setting another to do his work and by being himself elsewhere, reap the benefit of his agent's work and escape the consequences of the latter's conduct; that it would be impossible to effectually enforce a statute or ordinance of this kind if that were permitted, and that it would become a dead letter.

Appellant argues that the rule of the liquor cases should not be applied here, and that a distinction should be made. We believe no distinction in principle exists. A police regulation has been provided in each instance, and a penalty has been provided for the violation thereof. The penalty has been provided for the actual violation of the regulation, and not necessarily because of an intent to do so. The violation in each instance was by an agent who was prosecuting the work of the accused. In the case at bar, the accused principal was near the work, and if not actually present to see what was done, it was nevertheless his legal duty to see that the ordinance was not violated. Failing in this, he must suffer the penalty for the violation, since if it were not so, then within the reasoning of the authorities, the public would not be adequately assured of protection from violation of the ordinary police regulations. The court did not err in giving the quoted instruction.

Appellant assigns as error the refusal to give an instruction which seems to proceed upon the theory that, if the jury

found that appellant was a member of a copartnership which was conducting the quarrying business at the place of the blasting, then unless they should find that as such partner he participated in the act or assented thereto, they should find him not guilty. We see no force in this contention. There can be no distinction in such a case between his assent as a partner and his assent in his individual capacity. It is also immaterial that he may have had a partner or partners. That others may be also guilty, does not relieve him of liability for an offense jointly committed.

The judgment is affirmed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 6598. Decided March 28, 1907.]

THE CITY OF SPOKANE, *Respondent*, v. FRANK L. PRESTON
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—OBJECTIONS—WAIVER—JURISDICTION—AMOUNT—SEWERS. An objection to an assessment for the construction of a sewer in that the petition of property owners therefor was confined to a main sewer, while the assessment was extended to include, also, the costs of lateral sewers thereafter recommended by the board of public works and authorized by the city council, must be made before the city council and cannot be first raised in an action to foreclose the assessment; inasmuch as jurisdiction to levy an assessment was conferred by the petition, and the objection reaches only the amount of the assessment; especially where the improvement was authorized by a two-thirds vote of the city council, and under the charter a petition by property owners was not essential to jurisdiction in such a case.

SAME. An objection to a local assessment that property benefited was omitted from the assessment reaches only the amount assessed against other property, and must be first raised before the city council.

¹Reported in 89 Pac. 406.

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Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 10, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a city to foreclose assessment liens for local improvements. Affirmed.

Henley & Kellam and Hamblen, Lund & Gilbert, for appellants.

J. M. Geraghty and Lester P. Edge, for respondent.

HADLEY, C. J.—This is an action to foreclose assessment liens for the construction of sewers in the city of Spokane. In 1904 a petition was addressed to the board of public works and city council of said city, signed by the owners of property fronting upon Pacific avenue, a street within the city. The petition asked for the construction of a sewer to be laid in Pacific avenue at the expense of the city and property owners. The petition was filed with the board of public works, who reported it to the city council, recommending the construction of a sewer upon that street, and also further recommending the construction of some lateral sewers in connection therewith. The council then passed an ordinance authorizing the construction of the Pacific avenue sewer as asked in the petition, and also authorizing the lateral sewers as recommended by the board of public works. These lateral sewers were extended along four short stub streets running north from Pacific avenue to the south line of the Northern Pacific Railway Company's right of way. The ordinance created an assessment district and an assessment was laid for the entire expense of constructing both the main and lateral sewers. This action is to enforce the assessment, and from a judgment in favor of the city the defendants have appealed.

Appellants contend that the city departed from the improvement for which the property holders petitioned, and that it was, therefore, without jurisdiction in the premises. It is urged that the petition was the necessary initiatory proceed-

ing by which the city acquired jurisdiction, and that inasmuch as it did not call for the lateral sewers, the city was without power to include them in the assessment district. Appellants collaterally attack the assessment proceedings, and unless the record manifestly discloses lack of jurisdiction to make the assessment, they are concluded. Any objections to mere irregularities should have been made before the city council and the errors corrected through the regular channels of appeal provided by law. *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632.

The city contends that the objection made does not raise a jurisdictional question; that it affects only the amount of the assessment, and that it should therefore have been urged before the city council. It is not contended by the appellants that their property is not properly assessable for the Pacific avenue sewer, and we fail to find any contention that the extension of the laterals brought appellants' property within the district, when otherwise it would or might not have been included. The controversy therefore seems in effect to reach to the amount of the assessment only, and if that is true, then since the appellants were constructively before the council at the time of the hearing upon the confirmation of the roll, and since the records there disclosed the extent of the plans and also that the expense of the laterals was included, the objection should have been raised at that time. Even under appellants' theory that the city could not acquire jurisdiction except through the petition, jurisdiction was at least acquired to construct the sewer directly within Pacific avenue, and having jurisdiction for that purpose, the city was not divested of its power to make at least some assessment upon appellants' property, and it was their duty to make objections to the amount thereof before the council. It cannot fairly be said that appellants could have merely filed their petition and then have given the matter no further attention. Subsequent to the filing, the board of public works

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reported to the city council in favor of the scheme of adding the short lateral sewers to the improvement and of creating an assessment district for the whole. The council then passed an ordinance specifically providing for the construction of the main sewer as well as the laterals and creating the assessment district. This was not only a public record, but it was also a public law of the city of which appellants were required to know. Having this knowledge and knowing that the amount of their assessment might be affected by this enlarged scheme of the ordinance, they should not now be heard to object to the amount when they could have done so before the council. Especially must this be the case since we have seen the city had admitted jurisdiction to make an assessment in some amount.

Aside from the foregoing, we believe a further argument made in respondent's brief must prevail. The argument is to the effect that, under the showing made in this record, no petition of property owners was necessary as a preliminary step to confer jurisdiction. The record shows that the ordinance was passed by a vote of more than two-thirds of the whole council. Section 1 of ordinance A1080, page 83, Code and Charter of the City of Spokane, seems to give the council plenary power to order the construction of sewers when the ordinance is passed by the vote above mentioned. The section is as follows:

"All petitions for the construction of main or trunk sewers shall be filed with the board of public works. The construction of a main or trunk sewer, or sub-sewer, where the whole or any portion of the cost and expense thereof is to be defrayed by the collection of special assessments upon the lots or parcels of land benefited thereby, shall not be ordered, except by an ordinance which shall have passed by a vote of at least two-thirds of the whole council: *Provided*, That, whenever the owners of at least one-half of the property subject to contribute to the cost of constructing said sewer shall file a petition therefor, such construction may be ordered by ordinance passed by a majority of the members present: *Pro-*

vided further, That the legal representatives of such owners may sign such petition for and on behalf of the owners."

It will be observed that the section in no place says that there must be a petition, but when there is one it shall be filed with the board of public works. It will also be observed that, if there is a petition by the owners of at least one-half of the property subject to contribute to the cost of the sewer, then the improvement may be ordered by ordinance passed by a majority of the council present. The manifest intention is that when there is a petition, a bare majority of the councilmen present may order the improvement, but when there is no petition it may be ordered by a vote of two-thirds of the whole council. Section 2 of the same ordinance is as follows:

"Whenever a petition for the construction of a main or trunk sewer or sub-sewer shall be filed with the board of public works the board shall ascertain if the signers thereof are the owners of at least one-half of the property subject to contribute to such improvement; and if they find such to be the fact, they shall report such petition to the city council with their recommendation as to the granting of the same. Such report shall contain a statement of the assessed valuation of the property owned by the parties signing the petition and an estimate of the cost of such improvement. Such report shall further set forth the reasons for the recommendations of the board with respect to granting or refusing the prayer of the petition. If the recommendation of the board of public works be that the prayer of the petition be granted, such board shall transmit with such report a map, plans and specifications for the proposed sewer. Whenever, in the absence of any petition, the council shall desire to order any main or trunk sewer or sub-sewer constructed, it shall, by resolution, direct the board of public works to prepare and transmit a report on such work, and said board shall, thereupon, prepare and transmit to the council such report, map, plans and specifications, in the same manner as if there had been a petition for such work and a favorable report by the board."

It will be observed that the last-quoted section provides that, when there is a petition, the board of public works shall

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ascertain if the signers thereof are the owners of at least one-half of the property subject to contribute to the improvement. If they find such to be the fact, they shall report the petition to the city council with their recommendation that the same be granted. They shall also transmit with their report a map, plans, and specifications for the proposed sewer. Thus, in the case of a petition, the matter is first brought before the council through the report of the board of public works, with the plans and specifications already prepared, and these must also be accompanied by a statement from the board of the assessed valuation of the property owned by the parties signing the petition and an estimate of the cost of the improvement. But it is also provided that whenever, in the absence of a petition, the council shall desire to order the construction of a sewer, it shall by resolution direct the board of public works to prepare and transmit a report on such proposed work, with map, plans and specifications, in the same manner as if there had been a petition for such work and a favorable report by the board. Thus it is made clear that the council may, of its own motion and without a petition, initiate the proceedings. It is true, in such case it ordinarily by resolution orders the board of public works to prepare and submit a report, but in this instance there was a full report already before the council filed with the petition. The purpose of the resolution is to procure certain information through the board of public works, but inasmuch as that information had already been furnished by the proper authority, there was no occasion for the resolution. The resolution itself is not the necessary jurisdictional step to warrant action by the council, but the necessary thing is the presence before the council and the filing with the city as a public record of the map, plans, specifications and estimates prepared and transmitted by the board of public works. Having this information and this record before it, we think the council was invested with full power and jurisdiction to proceed without

regard to the petition, when two-thirds of all the councilmen voted to do so.

Another point urged by appellants is that property which should have been included in the assessment district was omitted. This also goes to the amount of the assessment only. Appellants' property was properly within the district and was subject to assessment. The assessment was made on the principles of benefits accrued, and if appellants' property was assessed too much and not ratably with other property similarly benefited, it was their duty to so inform the council and there object to the amount of the assessments.

We believe there was no error, and the judgment is affirmed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 6563. Decided March 28, 1907.]

THE STATE OF WASHINGTON, *on the Relation of John D. Atkinson, as Attorney General, Appellant, v. WORLD REAL ESTATE COMMERCIAL COMPANY et al., Respondents.*¹

ALIENS—RIGHT TO HOLD LAND—ESCHEAT—CONVEYANCE. The state cannot maintain an action to escheat lands, conveyed to and held by an alien in violation of the constitution, after the same have been conveyed by the alien to a citizen.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 14, 1906, upon sustaining a demurrer to the complaint, dismissing proceedings to declare an escheat of real property held by an alien. Affirmed.

The Attorney General, and J. B. Alexander and A. J. Falknor, Assistants, for appellant.

John E. Humphries and Geo. B. Cole, for respondents.

¹Reported in 89 Pac. 471.

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Opinion Per CROW, J.

CROW, J.—This action, a proceeding in the nature of office found, was instituted by the state of Washington on relation of John D. Atkinson, its attorney general, to escheat certain real estate in King county. The essential facts, as alleged in the complaint, are that on March 24, 1900, the defendant Arthur Hamilton, being the owner of the real estate in question, by deed conveyed the same to the defendant Y. Ota, an alien of the Mongolian race, born of Japanese parents in the empire of Japan; and that Y. Ota retained the record title until May 17, 1905, when he and his wife Kane Ota, also an alien, conveyed the property, for a valuable consideration, to the defendant World Real Estate Commercial Company, a domestic corporation the majority of whose stock was owned by citizens and residents of the state of Washington. The plaintiff contends that, under article 2, § 33, of the constitution of the state of Washington, an alien cannot acquire title to real estate by deed, save in the excepted cases therein mentioned; that he cannot by his deed convey a good title to his grantee, and that the state may, in a proceeding of this character, escheat the real estate at any time after its conveyance to the alien, even though the alien has conveyed to a citizen before proceedings for escheat are commenced. The defendants interposed a general demurrer to the complaint, which being sustained, the plaintiff refused to plead further. Thereupon a judgment was entered dismissing the action, and this appeal has been taken.

Since the appeal was taken herein we have, in the case of *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, construed the section of our constitution upon which the appellant relies, and in effect held that the state must forfeit or escheat lands, conveyed to and held by an alien in violation thereof, prior to any alienation of such real estate by the alien to a citizen, for a good and valuable consideration. Passing upon the question herein involved, we said:

“Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed

executed to her by the appellant Abrams was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed. This court, however, in the case of *Oregon Mortgage Company v. Carstens*, *supra* [16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841] in substance held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed transfer a good title to a third person entitled to receive and hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham [the alien], after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the state of Washington could not thereafter, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have successfully instituted proceedings to declare a forfeiture and escheat."

The trial court committed no error in sustaining the demurrer. The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 6498. Decided March 29, 1907.]

R. K. BROWN, *Respondent*, v. E. A. BALDWIN *et al.*,
Appellants.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in an equity case triable *de novo* on appeal is harmless.

SAME—AMENDMENT OF COMPLAINT—CREDITOR'S SUIT—RETURN OF NULLA BONA. In an action by a judgment creditor to quiet title to property conveyed by the debtor in fraud of creditors, findings for plaintiff will not be reversed on appeal for failure to show an execution returned *nulla bona*, where the court found upon sufficient evidence that the debtor had no other property; and the pleadings will be considered amended in that respect.

¹Reported in 89 Pac. 483.

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Opinion Per DUNBAR, J.

QUIETING TITLE—PLEADING—WAIVER OF OBJECTIONS. An objection that an action to quiet title could not be maintained by one out of possession who failed to allege that the land was vacant and unoccupied, is waived by trial of the issue as to title, raised by answer asking that the title be quieted in the defendants, although a demurrer *ore tenus* was interposed at the trial.

ACTIONS—FORM—ABOLISHMENT OF DISTINCTIONS—QUIETING TITLE—CREDITOR'S SUIT—RELIEF. An action by a judgment creditor to quiet title, in which the complaint alleges a conveyance in fraud of creditors and the purchase of the property by plaintiff on execution sale, should not be dismissed for error in the form of action, in that the complaint failed to allege that the plaintiff was in possession or that the land was vacant and unoccupied, but alleged the defendants to be in possession by the receipt of rents; since the code abolishes all distinctions in the forms of action, and the court may give the relief sought where the facts stated show the party entitled thereto.

Appeal from a judgment of the superior court for Clallam county, Hatch, J., entered April 3, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

John H. Hall, James G. McClinton, and Chamberlain & Thomas, for appellants.

Trumbull & Trumbull, for respondent.

DUNBAR, J.—In the spring of 1899, the respondent was the owner of a certificate of stock in the Union Savings & Loan Association, of the par value of \$5,000. The association denied any liability upon the stock, and the respondent brought suit against the association and recovered a judgment for the face value of the same. Upon appeal this judgment was reduced to \$2,547 and interest. In July, 1899, and after the respondent had threatened to bring the aforesaid suit, the defendant association made a deed to appellant Baldwin, purporting to convey to him, among other tracts of land, the tract which is the subject of this suit. Appellant Baldwin gave a mortgage for \$3,500. On the 10th day of October, 1899, the defendant the Cooperative Investment Company was organized as a corporation under the laws of

the state of Oregon. On January 21, 1901, it is alleged that Baldwin paid the amount of his note for the purchase price of the Lake Crescent property, the subject of this controversy, and shortly thereafter the mortgage was satisfied by the Union Savings & Loan Association. On March 27, Baldwin and wife deeded the property to the defendant the Cooperative Investment Company. On March 6, 1901, execution was issued out of the superior court of Jefferson county to the sheriff of Clallam county on the judgment aforementioned. On April 8, 1901, the property was sold by the sheriff to plaintiff, for the sum of \$1,253. This action was afterwards commenced to quiet title to the Lake Crescent property, the complaint alleging that the deed made by the defendant the Union Savings & Loan Association, and the deed by Baldwin to defendant the Cooperative Investment Company, were without consideration, fraudulent and void. The defendants answered, denying the affirmative matter in the complaint, and asking to have declared good their title to the land which was the subject of the suit.

The findings of fact are voluminous, the court setting forth in minutiae the history of the transactions. But without setting them all forth here, it is sufficient to say that, among other things, the findings are to the effect that the Union Savings & Loan Association had entered into an unlawful and fraudulent conspiracy with the defendants Billings, McArdle, and Baldwin, to hinder, delay and defraud the plaintiff in the collection of his demand against the said Union Savings & Loan Association, and that what purported to be a deed of conveyance from the association to Baldwin was without consideration; that the same was voluntarily made, in secret trust, for the benefit of the Union Savings & Loan Association and its officers, for the purpose of hindering, delaying, and defrauding the creditors of the Union Savings & Loan Association and more especially this plaintiff; that among all the property so fraudulently conveyed, the land in Clallam county which is the subject of this suit

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was so conveyed (describing the said land), and that all the subsequent proceedings in relation to the conveyances of this land were fraudulent and void and the result of conspiracy; that the Cooperative Investment Company was organized by Billings, McArdle, and Baldwin, who were officers at that time of the Union Savings & Loan Association, for the express purpose of transferring to it the property and assets of said Union Savings & Loan Association, and absorbing all the assets thereof, and saving the same for the individual benefit of Billings, McArdle, and Baldwin, all of whom were trustees and officers of the said Cooperative Investment Company, and that the said corporation was organized as a part of said conspiracy and combination to defraud the creditors of the said Union Savings & Loan Association. These findings are set forth in detail and with more or less repetition, but we have set forth sufficient of them for the purposes of this case.

These findings in the main were excepted to by the defendants; but, without entering into an analysis of the testimony, an examination of the record convinces us that they were amply justified by the testimony, and we will consider them as the facts in the case in the disposition of this appeal. The court, upon these findings, entered a decree quieting the title of the plaintiff as prayed for, and awarding judgment for the rental value of the lands. From this judgment this appeal is taken.

It is contended that the court erred in the admission of certain testimony. But this court has uniformly decided that the admission of testimony in a case which is tried *de novo* by this court is not ground for a reversal of the cause. This court will look at the testimony and, if it is not properly admitted, will not consider it in reaching its conclusion in the case.

It is also contended that the respondent's case must fail for the reason that the complaint does not allege that the execution against appellant, the Union Savings & Loan Asso-

ciation, had not been returned *nulla bona*, and that there was no allegation that the appellant had no other property out of which the judgment could be made; and many cases are cited from this court to sustain this contention. The court, however, found that, when the execution in the said cause was levied, the said Union Savings & Loan Association had no property in the state of Washington or Clallam county subject to levy and sale, save the property described in the deed of July 18, 1899, and pretended to be conveyed to the said Baldwin. If that be true—and there is testimony to sustain the finding—this being an equity case, the court will not reverse the case and send it back for a retrial for the purpose of allowing the respondent to amend his complaint, but will consider the complaint amended in that respect.

The main contention of the appellants, outside of the correctness of the facts found, which we have before noticed, is that the action must fail for the reason that it is an action to quiet title, and that there is no allegation in the complaint that the plaintiff was in possession, or that the land which is the subject of the suit was vacant land, or that the premises were unoccupied; but that, on the other hand, such a conclusion was negatived by the allegation that the defendants Baldwin and the Cooperative Investment Company had received the rents and profits since the date of the sale of the property; and *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, is relied upon to sustain this contention. It was decided by this court in that case that an action to quiet title should be dismissed for want of equity under our statute, where there was no proof showing that the plaintiff was in possession of the land in question or that the same was unoccupied by any person, on the theory that to hold the contrary doctrine would be to allow an equitable form of action to be substituted in every case for an action of ejectment, and the defendant in possession of the property to be deprived of his constitutional right to a trial by jury. But

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it was afterwards decided by this court, in *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961, that where defendants do not, until after trial, raise the objection that plaintiffs' form of action should have been in ejectment instead of one to quiet title, because they were not in possession of the land and the land was not vacant and unoccupied, the objection must be deemed as waived. In that case the defendant demurred to the complaint, afterwards answered by denials, and by affirmative matter constituting a defense in which he pleaded title in himself by virtue of the deed the plaintiffs sought to have cancelled, praying that the plaintiffs' muniment of title be held void and a cloud upon the title; thus, as the court said, "Submitting to the court the very issue the plaintiffs sought to have submitted." In this case it is true that there was no demurrer to the complaint, but the objection was raised, after the issues were joined, that the complaint did not state a cause of action, the answer affirmatively alleging title in the Cooperative Investment Company, derailing their title historically from the Union Savings & Loan Association, and praying that the defendant the Cooperative Investment Company, be decreed to be the owner in fee simple of said real property, free and clear of all right, title, interest, or claim of the plaintiff. This answer brings the case squarely within the rule announced in *Bates v. Drake*, *supra*, with the exception that the objection was raised by objection to the testimony instead of by the ordinary demurrer. But this objection was in reality a demurrer to the complaint, for it was to the effect that the complaint was not sufficient to constitute an action because the allegation of possession did not appear in the complaint, and the defendants ought not to be placed in any better position than a defendant who demurs to an insufficient complaint in an orderly way, by demurring in this irregular way after the issues had been joined. The appellants then, upon the issues which they had helped to make, tried out the case, asking

that their title be established and that any cloud upon it be removed. This same doctrine was announced in *McKinley v. Morgan*, 36 Wash. 561, 79 Pac. 45, where, in discussing the case of *Spithill v. Jones*, this court said:

"This is a case with which this court has never been entirely satisfied, and we do not care to extend the doctrine there announced."

In *Anderson v. Provident Life & Trust Co.*, 25 Wash. 20, 64 Pac. 933, where an action was brought in the form of a creditor's bill to set aside fraudulent conveyances and subject real estate to sale free from any cloud occasioned by such conveyances, and the objection was raised that the complaint did not state facts sufficient to entitle the appellant to equitable relief, it was said:

"Nor does the fact that a party may have a remedy at law necessarily preclude him from invoking the aid of equity in cases of this character. If the legal remedy is inadequate to afford full relief, resort may be had to equity in proper cases. Indeed, it is a well-established principle that equity has concurrent jurisdiction with law over frauds, under statutes relative to fraudulent conveyances";

citing *Wait on Fraudulent Conveyances* (3d ed.), § 51, and *Bump on Fraudulent Conveyances* (4th ed.), § 530. The court continuing says:

"And the creditor himself may select the forum in which the question of fraud shall be determined, or, in other words, he has the option to submit the determination of the question either to a court of law or a court of equity;"

citing *Bump on Fraudulent Conveyances* (4th ed.), p. 532, where that author says:

"But the remedy most frequently used is a bill in equity, because a court of equity sifts the consciences of the parties and removes the cloud from the title. Fraud constitutes the most ancient foundation of its jurisdiction, and is a sufficient ground for its interposition. It may grant relief, although there is ample remedy at law; for no relief is adequate except that which removes the fraudulent title."

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It is further said by this court, quoting from Wait on Fraudulent Conveyances (3d ed.), page 60:

"The existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity to secure a cancellation of a fraudulent conveyance, . . ."

The case of *Spithill v. Jones*, *supra*, has been sustained grudgingly by this court in one or two cases since its announcement, but always, as in the cases cited above, restricting the doctrine announced as far as possible without absolutely overruling that case. But in consideration of the fact that this case would have to be affirmed in any event, and in consideration of the further fact that the doctrine announced in that case seems to be opposed to reason and to the spirit of our statutes, we take this occasion to overrule it and all subsequent cases based upon it. In undertaking to limit the effect of that ruling, this court, in *Bates v. Drake*, *supra*, said:

"*Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, is cited as sustaining this contention. This court in that case did hold that an action to quiet title should be dismissed for want of equity where the proofs failed to show that the plaintiff was in possession of the lands the title to which was sought to be quieted, or that the same was unoccupied by any person. It spoke also as if the question was one of the jurisdiction of the court. It is clear, however, from the opinion as a whole, that the court did not mean by its use of this term that it was without jurisdiction or power to determine the subject-matter of the controversy between the parties or that a judgment entered therein would have been void, but meant rather that equity would not entertain a suit to quiet title when the plaintiff had an adequate remedy at law, . . . The fact that the plaintiff is or is not in possession, or that the land is or is not vacant, does not affect the jurisdiction of the court to determine the subject-matter of the controversy between the parties, nor does it affect the merits of that controversy, but affects only the plaintiff's right to have the merits of the controversy determined in that particular form of action."

This being true, it shows how palpably wrong the announcement made in *Spithill v. Jones* was, and the inconsistency which this court was driven to in the case just cited in trying to sustain the doctrine of that case on the theory that it referred only to the form of the action, when the first expression of the law on the subject of the form of civil action provides that, "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." Pierce's Code, § 250 (Bal. Code, § 4793). This is a mandatory provision of the law, and a ready yielding of allegiance to this mandate on the part of the courts of the state will simplify legal proceedings and strip them of fictions and technicalities which find no place in the reformed procedure. This holding does not lead to the conclusion that all the distinctions between law and equity are abolished, or that equitable actions are not to be tried under the same rules under which they always have been tried. It simply means that it makes no difference what the action is termed, and that the relief sought must be granted according to the demands of the complaint if they are substantiated by proof; that an applicant for justice is not to be turned out of the temple of justice scourged with costs because he happens to come in at one door instead of another, and be compelled to enter that other door to ask the same remedy at the hands of the same court. The court is the same, sitting at the same place, clothed with the same authority, and when once the applicant has gained legal access to the court through a statement of facts, which the law demands that the complaint shall be, he is entitled to just such relief as his complaint and his proof warrant; and in the trial of the cause, if it is discovered that the relief is equitable, the court will administer the equitable relief. If it becomes necessary in the trial of the cause to determine a purely legal right, the court, as it always has done, may call a jury to try out that question.

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But this court has spoken on this subject before, and outside of many cases which have tended to protect a party who is in court from being excluded because of the mere form of his action, it was decided in *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264, that it was error for the court to dismiss an action for damages for forcible and wrongful eviction from leased premises, on the ground of the invalidity of the lease in law for lack of acknowledgment. In discussing that question, it was said:

"We think the court erred in dismissing the action. Whether or not the contract or lease was originally illegal, it is not necessary for the purpose of this discussion to determine. But if illegal, a part performance of the contract, either by the plaintiffs taking possession of the premises under the lease or by the payment and acceptance of rent under the terms of the lease, would render the lessor liable for damages for its violation by him; and the court, in holding that part performance could not be shown in an action for damages, lost sight of the rule of concurrent jurisdiction with which courts are clothed, especially under the reformed procedure. Our statute (Bal. Code, § 4793) provides that there shall be in this state but one form of action for the enforcement of private rights and the redress of private wrongs, which shall be called a 'civil action'; and this statute evidently means something. It was not intended by this enactment of the law-making power to leave in force or to perpetuate the old distinctions which existed at the common law between legal actions and equitable procedures, so far as the manner of bringing the actions is concerned. It was plainly the intention thereby to abolish such distinctions, and to substitute for all other forms of complaint a statement of facts, for it provides that the complaint shall contain a plain and concise statement of facts constituting the cause of action, and this plain and concise statement of facts must necessarily be the same (if it is a concise statement of facts) whether the relief or remedy sought by the action be equitable or legal in its nature. In this case, if the plaintiffs had demanded specific performance, the statement of facts on which the demand would have been based would have been identically the same statement as that upon which

the demand made *was* based. It is not in accordance with the spirit of the code to turn a litigant out of court, and subject him to the costs and delays of bringing another action before the same tribunal on the same pleadings. . . . It may not have been the intention of the legislature to abolish all the distinctions which have so long existed between legal and equitable proceedings and the rules governing them. That question it is not necessary to discuss here. But it was the evident intention to provide for the trial and determination of all rights, whether denominated legal or equitable, in one action, and to relieve from the necessity of a multiplicity of suits to determine controversies between litigants. The superior court is a court of general jurisdiction. It has the power to try either legal or equitable proceedings, having concurrent jurisdiction in both. It is not a law court, nor an equity court, nor a probate court, but it is all the time the superior court of general jurisdiction, empowered to try all these differently termed causes under the title of a civil action; and when it has once acquired jurisdiction of that civil action it may proceed in an orderly way to determine equitable, legal, or probate controversies";

citing *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107, where this question is pointedly discussed, and Pomeroy's *Equity Jurisprudence* (2d ed.), §§ 183, 187.

Applying these principles to this case, the respondent, if the allegations of his complaint were true, was entitled to relief. These allegations constituted a statement of facts, and being properly before a court of competent jurisdiction to try the questions raised by the pleadings, whatever relief he was entitled to should have been administered by that court, regardless of whether the relief was equitable or legal.

The judgment is affirmed.

HADLEY, C. J., MOUNT, FULLERTON, ROOT, CROW, and RUDKIN, JJ., concur.

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Statement of Case.

[No. 6551. Decided March 29, 1907.]

H. G. RICHARDSON, *as Receiver of the Agnew-Baldwin Cedar Company, Respondent*, v. W. I. AGNEW *et al.*,
Appellants.¹

CORPORATIONS—RECEIVERS—COLLECTION OF ASSETS. In an action by a receiver of a corporation to recover money misappropriated by an officer of the corporation, a nonsuit should not be granted for failure to show that the receiver was the owner of the claim, where plaintiff's evidence did not affirmatively show that the corporation had parted with its interest therein.

TRIAL—REOPENING CASE—DISCRETION OF COURT. It is within the discretion of the court to reopen a case for the introduction of further testimony, after motion for nonsuit is made, and no abuse appears where no prejudice or surprise is shown.

EVIDENCE—HEARSAY. Declarations claimed to have been made to a disinterested witness by the vendor of logs, since deceased, are inadmissible as hearsay upon an issue as to the making of the sale.

TRIAL—EVIDENCE—OBJECTIONS—SUFFICIENCY. It is not error to exclude hearsay evidence, expressly stating that ground, although the same was only objected to as evidence of conversations with a deceased person.

TRIAL—VERDICT—EXCESSIVE VERDICT—MISTAKE—CORRECTION BY COURT. A verdict for \$1,472.80 will not be held to be the result of passion or prejudice from the fact that, from certain figures and argument, counsel seemed to have conceded that the amount should not exceed \$1,167.10, but rather of a mistake on the part of the jury, authorizing its correction by the court, where the evidence was very conflicting, many items were in dispute, and the amount found was less than the complaint claimed and which might have been allowed under the instructions.

APPEAL—REVIEW—VERDICT. The weight and preponderance of the evidence is for the jury where the evidence is conflicting.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered April 20, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed.

¹Reported in 89 Pac. 404.

G. C. Israel, for appellants.

King & King and *Troy & Falknor*, for respondent.

HADLEY, C. J.—The plaintiff in this action is the receiver of the Agnew-Baldwin Cedar Company, an insolvent corporation. Said corporation is the successor, by mere change of name, of the Flynn Shingle Company. The defendants are husband and wife, and were such when the transactions occurred of which the plaintiff complains. It is alleged that from the 16th day of December, 1901, to the 11th day of April, 1904, the defendant W. I. Agnew was the secretary and treasurer as well as manager of the said corporation, and within his said capacities and while acting therein, he appropriated and converted to himself and his codefendant funds of said corporation in the sum of \$1,580.92. This is a suit by the receiver against both husband and wife to recover judgment for the above-named amount. The material averments of the complaint are denied by the answer. A trial was had before a jury, and a verdict was returned for the plaintiff in the sum of \$1,472.80. Judgment was forthwith entered for the amount, but upon hearing the defendants' motion for new trial, it appeared to the court that the verdict should have been in the sum of \$1,167.10, and the plaintiff agreeing in open court to such reduction, it was ordered that the judgment should be reduced to the last-named amount. The defendants have appealed.

It is assigned that the court erred in refusing to grant the motion for nonsuit, for the reason that it appeared that the receiver had no interest in the indebtedness sought to be enforced, and also that there was further error in permitting the respondent, after the motion for nonsuit had been submitted, to reopen the case and offer additional evidence. One ground urged for the nonsuit was that respondent had not shown himself to be the owner or holder of the claim upon which he sued. As receiver he represented the corporation. The claim sued upon was for moneys of the corporation al-

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leged to have been misappropriated by one of the appellants while acting in an official capacity for the corporation. The claim, therefore, necessarily belonged to the corporation, unless it had parted with its interest, and unless it affirmatively appeared from respondent's evidence at the time the motion for nonsuit was made that the corporation had parted with its interest, the motion was properly denied. Respondent urges that the evidence did not affirmatively show that the corporation had parted with its interest. It showed that by resolution the corporation authorized its president and secretary to execute to the Capital National Bank all necessary conveyances to accomplish the transfer to it of all personal property of the corporation. But respondent argues that this was not a contract of sale, but was mere authority granted by the trustees to consummate a sale in the future. The resolution itself, it is true, transferred nothing. It appeared in evidence that a transfer was subsequently made to the Capital National Bank. But the respondent contends that it did not appear just what was conveyed, and that especially was there nothing which clearly showed that this particular claim was connected with the bank transfer. But whether the nonsuit should have been denied in the first instance, it is unnecessary to decide, in view of the proof subsequently introduced. We think it was a matter so clearly within the discretion of the court to permit respondent under the circumstances to reopen the case and submit further proof that it cannot be treated as error, unless the discretion was abused. We do not think there was an abuse of discretion. It was in the interest of justice that the facts should appear at that trial, without the necessity for further trial, and there was no showing of prejudice by way of surprise or otherwise. When the case was reopened, Mr. Lord testified that, before the assignment to the bank, he and Mr. Agnew and Mr. Baldwin, the two latter being officers of the corporation, went over the accounts of the corporation that were assigned, and that this account was not included. If the previous testimony

had not shown that the account was not transferred to the bank, that of Mr. Lord did show it. A *prima facie* showing of indebtedness to the corporation, therefore, appeared in the evidence, and there was no error in denying the motion for nonsuit.

It was claimed by appellants that the appellant W. I. Agnew had, while he was the secretary and treasurer of the corporation, purchased from one Powe a boom of cedar logs, for which he paid with his private funds, and that he turned these logs over to the corporation and took credit in his account with the company for the sum of \$1,540 as the value of the logs. This item was in dispute between the parties at the trial. Powe was then dead, and appellant asked a disinterested witness certain questions which called for statements the deceased Powe had made to him concerning a sale of a boom of logs to appellants. Respondent's counsel objected, and remarked that the offered evidence purported to be the conversation of a dead man. The objection was sustained, and an answer the witness had given was stricken on the express ground, as stated by the court, that it was hearsay evidence. The ruling was not erroneous. The evidence was clearly hearsay, and the court was not required to admit evidence which it saw was clearly objectionable as hearsay, merely because counsel had named a ground of objection that might not have been effective if the testimony had been otherwise competent.

It is next contended that the verdict was excessive, and that it was necessarily given under the influence of passion and prejudice. We have seen from the statement of the case that the court made the final judgment \$305.70 less than the amount of the verdict. This reduction was made by the court for the reason that, during the argument to the jury, one of respondent's counsel placed a large number of figures upon a blackboard, representing items involved in the accounts between the parties, and he seems to have conceded by the figures and argument that respondent was en-

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titled to recover but \$1,167.10. In view of this concession, it is insisted by the appellant that the jury were manifestly controlled by passion and prejudice when they returned a verdict for a greater sum than the amount conceded. The amount returned was, however, within the issues and was for \$108.12 less than the sum claimed in the complaint. The jury were not instructed that they were limited to any other sum than that stated by the complaint. The evidence had taken a wide range and had covered numerous items. The jury must have exercised their prerogative of weighing the evidence. If passion and prejudice and not the evidence controlled them, it may well be asked why they did not return the full amount alleged in the complaint. We think the amount returned by them, in view of the entire record and of the concession made by counsel, should be regarded as no more than a mistake, and that the court cured the mistake when it corrected the amount. The verdict being within the issues, and it not manifestly appearing that the jury were controlled by prejudice, the mistake became one of law on the part of the jury. The evidence was very conflicting respecting the amounts of items that should be charged to appellants. The jury believed and found that respondent was entitled under the evidence to recover a sum less than that claimed in the complaint, but not being instructed on the point, they misapprehended their duty under the law as to the amount they should actually return in view of the concession of counsel. Under such circumstances, the verdict may well be attributed to a mistake of judgment, free from unfair intent, and a new trial is not necessary in order that the correction of such mistakes of the jury may be effected. *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935; *Blum v. Edelstein*, 20 Colo. 408, 79 Pac. 301.

It is also contended that the verdict as reduced is not sustained by the evidence. It is true the appellants by their evidence claimed credits for items which in the aggregate would more than offset the amount of the verdict even as

rendered by the jury. These were disputed, however. If these claimed credits should not have been allowed, then under the evidence respondent was manifestly entitled to recover. It became the duty of the jury to pass upon the weight or preponderance of the evidence. The jury exercised that prerogative, and the verdict is therefore conclusive. Since we find no reversible error in the record, the judgment is affirmed.

CROW, MOUNT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6413. Decided March 30, 1907.]

LAFAYETTE SKINNER, *Respondent*, v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

STREET RAILWAYS—PERSONS ON TRACK—DUTY OF MOTORMAN. When a street car motorman sees a man ahead in the street under no disability, he may assume that the other will exercise due care for his own safety, and it is not necessary for him to stop the car until he sees that the other is in apparent danger.

SAME—CARE REQUIRED AT CROSSING. It is not negligence for a motorman to fail to have a street car under absolute control at a street crossing so that it may be stopped immediately, where the track is clear and there were no passengers to take on at the far crossing.

SAME—CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN. A person is guilty of contributory negligence, as a matter of law, in stepping, on a dark night, in front of an approaching street car ten feet away, with its headlight burning, running within the speed limit, where a car bound in the opposite direction had passed and he knew that the cars were accustomed to meet there, and where the approaching car was in open view for a considerable distance while he was picking his way slowly across the mud and water in the street, without either hearing or seeing the car.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 14, 1906, upon the

¹Reported in 89 Pac. 488.

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verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries. Reversed.

B. S. Grosscup and Fitch, Jacobs & Baker, for appellant.
Ellis & Fletcher and A. H. Denman, for respondent.

MOUNT, J.—The plaintiff recovered a judgment against the appellant for \$2,000, on account of injuries received by reason of one of the appellant's street cars striking and dragging the plaintiff along K street, in the city of Tacoma. Defendant appeals from that judgment.

The respondent alleged that the appellant was guilty of negligence, by reason of its servants driving an electric car at a high and reckless rate of speed, passing another car on a parallel track at a street crossing, without slacking speed or ringing a bell or holding said car under control at said place. The answer denied any negligence of the company, and alleged contributory negligence of the respondent. The facts, as shown by respondent's witnesses, are, in substance, as follows: K street runs north and south in the city of Tacoma. The appellant operates a line of street railway along this street, and maintains a double track between South Sixth street and South Eleventh street, which cross K street at right angles. The westerly track is used for southbound cars and the easterly track for northbound cars. The meeting point of all cars was upon these double tracks, usually between South Seventh and South Eighth streets. K street is straight and level along the whole length of the double tracks. Respondent had lived for more than two and a half years on the west side facing K street, between South Seventh and South Eighth streets. He was familiar with the running of the cars. His house was about two hundred feet south of South Seventh street, the block between Seventh and Eighth streets being about three hundred and forty feet long. On October 15, 1905, between seven and eight o'clock

in the evening, respondent, in company with a grown daughter, undertook to cross K street, going west on the crossing at the intersection of South Seventh street, on the south side thereof. The night was quite dark. There were no street lights near. The respondent and his daughter stood on the southwest corner of the block until the south-bound car passed. Immediately thereafter they started to walk across the street, picking their way in the mud and water which was upon the crossing. They did not see or hear the north-bound car which was coming. The car was lighted and running not more than nine miles per hour, which was within the limit of speed allowed by the city ordinance. Respondent and his daughter both stepped upon the east track when the approaching lighted car was within about ten feet of them, respondent being between his daughter and the car. As soon as they stepped upon the track, the daughter saw the car and immediately stepped back and called to and caught at her father, but before he could escape the car struck him. As soon as the motorman saw the respondent and his daughter step into the light of the car on the track, he tried to stop his car, but was unable to do so in time to avoid the accident. The respondent was a man eighty-one years of age, but unusually spry and active for a man of his age.

There is some evidence that the car was going "fast" and at a "pretty rapid rate," making no noise. But there is no evidence whatever that the car which struck respondent was running at an unusual or dangerous rate of speed, or that the other car was at or even near the crossing. There is no evidence in the record that the appellant was negligent, except the mere fact that the accident occurred. The respondent's evidence shows that the accident could not have been avoided after respondent stepped upon the track in front of the car, unless the car had been moving slowly enough to be stopped within the space of ten feet. The south-bound car had passed the crossing before respondent and his daughter started to cross the street. The track which the north-

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bound car was using was at least thirty feet from respondent when he started to cross the street. Respondent walked slowly, picking his way across the street. The two cars, therefore, must have met each other some considerable distance south of the crossing, and from that meeting point the north-bound car was in open view of respondent and his daughter, coming towards them with all its lights burning. It was not shown that the motorman could or did see respondent or his daughter until they had stepped into the light upon the track; but if we may suppose he could see them and did so before they walked upon the track, he had a right to assume that they would be ordinarily careful and not step upon the track in front of his car, and it was not necessary for him to stop his car until he saw them in apparent danger. *Duteau v. Seattle Electric Co.*, 45 Wash. 418, 88 Pac. 755.

It is claimed, however, that it was the duty of the motorman to have his car under control at street crossings so that he might stop there for passengers. The only evidence that the car was not under such control was the fact that the car was not actually stopped until it had crossed beyond Seventh street. The custom was to stop on the side opposite where the respondent was injured. There was no one upon the opposite crossing and, on account of being a dark street, it was seldom used by passengers intending to take the car, and the motorman did not intend to stop there for that reason. If it is the rule that cars must be under control at street crossings, this control, in the absence of legislative requirements, must be a reasonable control, depending upon the circumstances, and not an absolute control so that a car may be stopped immediately under all circumstances. If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it

would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing. This case is one where there appeared to be no occasion for stopping at that time. We think the appellant's motion for nonsuit should have been sustained, upon the ground that no negligence of the appellant was shown.

There certainly can be no doubt that the respondent was guilty of contributory negligence when he deliberately walked in front of appellant's car. The respondent knew that the cars usually met upon that block. He was familiar with their running time. He saw the south-bound car pass. The night was dark, no lights nearby except the light of the car. Yet he carelessly walked upon the track, within ten feet of an approaching car with all its lights burning. He stepped directly into the rays of the headlight of the car. There was nothing to obstruct his view. We think there can be no dissenting opinion that this was negligence which caused his injury. The trial court should have, therefore, refused to submit the case to the jury. *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 880; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 87 Pac. 1058.

The judgment is therefore reversed and the case ordered dismissed.

HADLEY, C. J., FULLERTON, ROOT, CROW, DUNBAR, and
RUDKIN, JJ., concur.

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Opinion Per Root, J.

[No. 6478. Decided March 30, 1907.]

JACOB WEINHARD *et al.*, *Respondents*. v. J. H. SUMMERVILLE,
Appellant.¹

REFORMATION OF INSTRUMENTS—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the reformation of a warranty deed, so as to except a lease from the covenant of warranty, where it appears that the vendors, upon accepting part payment, gave a receipt calling for a warranty deed and abstract showing clear title and executed the deed containing no reference to the lease, that no representations were made to them as to the contents of the receipt or deed, which they read or had opportunity to read, and that there was no conversation or agreement as to the sale being made subject to the lease; and the fact that the vendee directed the agent to omit any reference to the lease in drawing the deed does not establish fraud.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered June 26, 1906, decreeing the reformation of a warranty deed. Reversed.

Gose & Kuykendall, for appellant.

Will H. Fouts, for respondents.

Root, J.—This was an action to reform a deed conveying certain real estate from respondents to appellant. From a judgment and decree directing such reformation, this appeal is taken.

The facts, as testified to by respondents' witnesses, were about these: One Cahill, a real estate agent, ascertained that appellant had about \$20,000 which he was desirous of investing in lands. Cahill also ascertained that respondents were desirous of selling their farm. He interviewed them and was told that they would sell for \$50 per acre, and would allow him a commission of \$50. He asked them if there was any lease upon the place, and they told him that there was a lease which ran for something like a year and a half there-

¹Reported in 89 Pac. 490.

after. Cahill reported all of these facts to the appellant, who went out and examined the farm and subsequently agreed to purchase it at the price mentioned. He thereupon gave Cahill \$1,000 which the latter paid over to respondents, receiving from them the following receipt:

"Dayton, Wash., April 28th, 1905.

"Received of W. E. Cahill check for one thousand dollars as part payment for my Royse ranch of 360 acres. The balance to be paid on the delivery of a warranty deed for said lands and an abstract of title brought up to date showing title clear, which I promise and agree shall be delivered within three days from this date or on or before Monday, the 30th day of April, 1905, said warranty deed to run to such party or parties as W. E. Cahill shall designate, said lands described as follows to wit: The south half of section ten and the southeast quarter of the southeast quarter of section nine, in township ten, north of range thirty-nine, East Willamette Meridian. Said abstract of title when completed to date to be delivered to W. E. Cahill for examination before final payment of balance of said purchase price which is \$17,000. Jacob Weinhard."

A few days thereafter Cahill, at the request of the appellant, drafted a warranty deed and took it to respondents who executed the same and placed it in escrow in the bank to be delivered upon full payment of the purchase price. Appellant told Cahill to say nothing about the lease in the deed and no mention thereof was made therein, the latter containing a warranty of the title absolute. The respondent Weinhard read the receipt before signing the same. He also read, or had an opportunity to read, the deed before signing the same. When Cahill handed respondent Weinhard the deed, the latter asked if it was all right, and Cahill replied that it was. As a matter of fact respondents had given a lease upon the farm and the lessee had sublet to another party who was then in possession of the land and was doing, and had already done, a large amount of summer fallowing, which was of considerable value. After appellant paid the balance of the purchase price (the total amount being

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\$18,000) he demanded to be put in possession of the premises. Cahill endeavored to make some arrangement with the tenant by which the latter should surrender the possession. These negotiations failing, the appellant became insistent that respondents should place him in possession of the property under the terms of his deed. At length this action was commenced by respondents filing a complaint wherein they alleged that appellant and Cahill had conspired to cheat and defraud them by getting their signatures to an absolute warranty deed, instead of one making an exception of the lease referred to. It appears from the evidence that Cahill, at his own expense, employed the attorneys who brought the suit for respondents. Some of the foregoing facts are disputed by appellant's evidence, but the material part of them is undoubtedly supported by a preponderance of the evidence.

Appellant contends that there is no evidence establishing any fraud or mistake which would justify the reformation of the deed in question. Respondents claim that they did not intend to give a deed which should not except the lease; that Cahill was acting in the dual capacity of agent for them and agent for appellant, they not knowing of his being appellant's agent; that they relied and depended upon him to attend to the transaction and to prepare the proper form of deed, and did not know that the exception was omitted from the deed until after they had signed it.

Appellant urges that, inasmuch as no misrepresentations were made to the respondents as to what the deed contained, and as respondents read, or had every opportunity to read, the receipt, which called for an absolute warranty deed and an abstract showing perfect title, and had likewise full opportunity to read the deed itself, that there are no facts established which would justify a court in setting aside or reforming this deed. We think this contention must be upheld. The very purpose of written instruments is to put the agreement of the parties in a definite and permanent form,

which will prevent those difficulties which arise from the imperfections of human memory, or other human weaknesses more reprehensible. When parties form their agreement into a written instrument, it is to be presumed, in the absence of a clear showing to the contrary, that they have done so deliberately, and that such instrument correctly evidences their contract. They may be set aside or reformed only upon the establishment of facts showing fraud or mistake. In this case there was a lease upon the premises. The purchaser knew of this and desired to get a deed that should not make mention of that lease. The vendors had a right to make such a deed. They did make such a deed. Only one of them, Mr. Weinhard, gave testimony upon the trial. He did not testify that he did not know the contents of the receipt and of the deed when he signed them, nor that he intended or offered to sell subject to the lease. Neither did he testify that Cahill or anybody else made any representations to him as to what were the contents of the receipt or of the deed. Neither of the respondents is shown to have requested that the deed should except the lease or make any mention thereof, and there is no evidence whatever of any agreement or of any conversation to the effect that the deal was to be for the land subject to the lease. The mere fact that appellant wanted all mention of the lease omitted from the deed could not constitute fraud, in the absence of some word or act deceiving or intending to deceive respondents in regard to the contents of the deed. The receipt for the \$1,000 expressly recited that a warranty deed was to be given, and that an abstract of title "showing title clear" was to be furnished. Considering all of the evidence in the case, there is nothing showing or tending to show that appellant, or Cahill as his agent, did or said anything calculated to deceive respondents as to the contents either of the receipt or of the deed. If it was the intention of respondents to sell the land subject to the lease, there is no evidence in this record that they ever expressed that intention to appellant or to Cahill, or anybody else represent-

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ing appellant, and neither is there any evidence that appellant ever agreed to buy the land subject to the lease. If respondents had such an intention and through carelessness failed to express the same to appellant or his agent, and failed to have that intention evidenced in either the receipt or the deed, it would seem clear that an omission of this character could not constitute, under such circumstances as we find here, the basis for a decree reforming the deed. We are unable to find evidence sustaining the decree appealed from. The same is therefore reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, MOUNT, CROW, DUNBAR, and
RUDKIN, JJ., concur.

[No. 6502. Decided March 30, 1907.]

P. R. KEITH *et al.*, *Appellants*, v. VICTOR HUGO SMITH *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—CONTRACT IN WRITING—MEMORANDUM—SUFFICIENCY. Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, a note of instructions to the agent containing none of the terms of the contract of employment is insufficient as a memorandum under the statute.

SAME—PERFORMANCE—EFFECT. Where a statute requires a contract for the employment of a broker, or a memorandum thereof, to be in writing, full performance of an oral contract will not take the same out of the operation of the statute or authorize a recovery upon a *quantum meruit*.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 11, 1906, upon sustaining a demurrer to the complaint, and the refusal of the plaintiffs

¹Reported in 89 Pac. 473.

to plead further, dismissing an action to recover a commission on a sale of real property. Affirmed.

Arthur & Hutchinson, for appellants.

Charles E. Patterson, for respondents.

Crow, J.—This action was brought by the plaintiffs, P. R. Keith and W. P. Sergeant, copartners as Keith-Sergeant Realty Company, against the defendants, Victor Hugo Smith and L. B. May, to recover a commission claimed to be due on the purchase of real estate. In their third amended complaint, to which we will hereafter refer as the complaint, the plaintiffs alleged, that on November 15, 1905, the defendants employed them to negotiate for the purchase of a certain described tract of land in Pierce county; that the contract of employment was orally made; that presently thereafter a note and memorandum thereof in writing, directing the plaintiffs as to their procedure in the matter, was signed by one of the defendants in behalf of both of the defendants, and delivered to the plaintiffs, in words and figures as follows:

“Seattle, Washington, 11-15-05.

“Messrs. Keith and Sergeant, Tacoma, Wn.:

“Dear Sirs: Enclosed find contract which Mr. Smith wishes signed by Mr. Fletcher and confirmed by Rice and wife. Advise us when abstract is ready, and we will come over at once. Yours, L. B. May.”

that said writing referred to the land above mentioned; that the person therein named as Mr. Smith is the defendant Victor Hugo Smith; that the person therein named as Mr. Fletcher is Donald Fletcher, who represented the owner of the land, and that the person therein named as Rice is Fred A. Rice, the owner of the land; that the abstract referred to is the abstract of title to the land, and that all of said references were fully understood by the parties to this action; that the plaintiffs negotiated the purchase of the land for the defendants, which negotiation was ratified and adopted by defendants, who, before the commencement of this

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action, actually purchased the land and made a payment thereon through the agency of the plaintiffs; and that the plaintiffs' services were worth the sum of \$1,250. To this complaint the defendants interposed a general demurrer, which was sustained by the trial court. Thereupon the plaintiffs electing to stand upon their complaint and refusing to plead further, a judgment was entered dismissing the action, and they have appealed.

The appellants contend that the trial court erred in sustaining the demurrer, and insist (1) that the note or memorandum set forth in the complaint, aided by its allegations, is a sufficient compliance with the statute of frauds, and (2) that their contract being fully performed, they are entitled to recover the value of their services on a *quantum meruit*. Chapter 58, Laws 1905, page 110, being an amendment of Bal. Code, § 4576 (P. C. § 5343), reads as follows:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The respondents, citing this section, insist that the complaint does not state a cause of action. Their contention was sustained by the trial judge, who held that the contract of employment should be in writing and that the note or memorandum set forth in the complaint does not meet the requirements of the statute. After placing the most liberal construction upon the note or memorandum pleaded by the appellants, we fail to see how it can be held a sufficient compliance with the statute. It does not purport to authorize or employ the plaintiffs to act as brokers. It describes no particular real estate. It mentions no terms of purchase or sale, no price or time of payment, no period during which the appellants'

authority, if created, was to continue, nor does it specify the amount of their commission. The alleged memorandum is so signally indefinite in its terms that it utterly fails to amount to written evidence of an agreement authorizing or employing the appellants to purchase real estate for the respondents for a commission or compensation.

"At common law a contract employing a broker for the purchase or sale of lands need not be in writing, and he may accordingly recover compensation for services rendered under an oral contract; but this rule has been changed by statute in some states. If a statute requires a written authorization, a broker who acts under a parol contract of employment cannot recover what his services are reasonably worth as upon a promise implied by law." 19 Cyc. pp. 219, 220.

See, also, 5 Current Law, 446. California has a statute almost identical with our act of 1905, and the supreme court of that state, in *McCarthy v. Loupe*, 62 Cal. 299, construing the same, said:

"Since the Code, no express contract in a case like this can be of any avail unless in writing. This particular kind of contract can only be proved by the introduction of an instruction in writing. Therefore the plaintiff failed to prove an express contract, and it was upon an express contract alone that he was entitled to recover."

See, also, *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *Dolan v. O'Toole*, 129 Cal. 488, 62 Pac. 92; *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138; *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281; *Covey v. Henry*, 71 Neb. 118, 98 N. W. 434; *Danielson v. Goebel*, 71 Neb. 300, 98 N. W. 819; *Zimmerman v. Zehender*, 164 Ind. 466, 73 N. E. 920; *King v. Benson*, 22 Mont. 256, 56 Pac. 280; *Barney v. Lasbury* (Neb.), 107 N. W. 989.

The courts of the several states in which statutes of this character have been enacted have constantly adhered to the rule that no action can be maintained for services performed in purchasing or selling real estate by an agent or broker, unless his contract of employment is in writing. This rule

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enforces the legislative intent evidenced by the enactment of such statutes. No other construction would do so. From its very nature a claim for commission could not be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself.

The Indiana statute on this subject, being § 6629a, Burns' Ann. St. 1901, reads as follows:

"That no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative."

In *Zimmerman v. Zehender*, *supra*, the plaintiffs endeavored to recover compensation for their services in procuring a purchaser for certain real estate. Their complaint in part declared upon an oral contract for payment by the defendant of a reasonable sum as commission, and further averred in substance that, at the time of the finding of the purchaser, the plaintiffs caused a written agreement to be prepared and executed by the defendant and the purchaser, wherein it was stipulated as a part of the consideration of the purchase and sale, that the defendant would pay the plaintiffs as his duly authorized agents, a sum of money theretofore agreed upon as their compensation in securing a purchaser for the land. A copy of this agreement was filed with, and made a part of, the complaint. The particular paragraph of the written memorandum or agreement relied upon reads as follows:

"(3) Said James Zehender further agrees that when said Wilson Spindler has complied with said contract to deliver or cause to be delivered a warranty deed in fee simple, free of all incumbrances whatever, and to compensate his authorized agents, Warner & Zimmerman, to the amount that has been and is now understood, and further agrees to give pos-

session of said described premises thirty days from date of contract."

The supreme court of Indiana, in passing upon the sufficiency of the complaint, said:

"The statute requires that the contract for the payment of a commission for the sale of real estate be in writing, and a written memorandum or acknowledgment of an oral contract will not fulfill the requirements of the law. . . . All of the provisions of the contract between appellee and Spindler relating to appellants were embraced in two lines, as follows: 'And to compensate his authorized agents, Warner and Zimmerman, to the amount that has been and is now understood.' This provision is extremely meager, and if we infer that appellants were the authorized agents for the sale of the particular real estate described, and were to be compensated for services rendered in connection with its sale, the material part of the agreement—the amount of the compensation—is still left in uncertainty and undetermined. The compensation is to be the amount 'understood'; but by whom is not stated. In short, the contract, in so far as it relates to this action, is only partially in writing. The important feature—the amount of commission to be paid—is to be ascertained by parol testimony in regard to an understanding which may prove to be a misunderstanding, the exact thing which the statute was designed to prevent. A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable. . . . A material part of the contract in suit being verbal, it must be held to be an oral contract, and therefore invalid."

We think the reasoning of the Indiana court may well be applied to the allegations of the complaint in this action, and that the note and memorandum therein set forth is utterly insufficient to constitute a compliance with our statute.

The trial court committed no error in sustaining the demurrer. The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

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[No. 6503. Decided March 30, 1907.]

FRANK TREMMELE *et al.*, Appellants, v. ANNA MESS,
*Respondent, et al.*¹

TAXATION — SUMMARY SALE — DEEDS — ASSESSMENT — IRREGULARITIES—EFFECT. A sale of lands for city taxes, under summary proceedings requiring a strict compliance with the statute, is void where the assessor failed to prepare an assessment roll in the manner required, or to file any roll within the time limited, and no notice of the meetings of the board of equalization was given, which did not meet within the time limited, and the comptroller failed to prepare or deliver a delinquent list, as required.

ADVERSE POSSESSION—PAYMENT OF TAXES—STATUTES—CONSTRUCTION. Under Bal. Code, § 5504, providing that any one who, under color of title to vacant lands, makes payment of taxes for "seven successive years," shall be adjudged the owner of the legal title, requires that seven years shall elapse between the date of the first payment of taxes and the commencement of the suit; and one who in 1902 redeems a tax certificate for previous years, since 1897, and pays subsequent taxes covering eight years in all, cannot maintain the action in 1906, four years after his first payment, if his redemption can be considered a payment of taxes.

Appeal from a judgment of the superior court for King county, Griffin, J., entered August 4, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. E. Foster, for appellants.

George McKay, for respondent.

MOUNT, J.—The plaintiffs brought this action, alleging that they are the owners in fee of certain described real estate in King county, and that the defendants without right claim to be the owners of the property. The prayer is for a decree quieting title in the plaintiffs. The defendants Carroll and wife answered, disclaiming any interest in or to

¹Reported in 89 Pac. 487.

the land, and were thereupon dismissed. The defendant Anna Mess answered, denying the allegations of the complaint and alleging title in herself by mesne conveyance from the United States, and prayed to have her title quieted against the claims of the plaintiffs. The cause was tried upon these issues. The court made findings in favor of the defendant Anna Mess, and entered a judgment quieting title in her, upon the payment by her to the plaintiffs of certain taxes paid by the plaintiffs upon the property. Plaintiffs appeal from this judgment.

There appears to be no substantial dispute upon the facts in the case. The respondent traces her title by mesne conveyances from the United States, under a patent issued January 9, 1882. The appellants trace their title by mesne conveyance, under tax deeds issued on May 19, 1894, by the treasurer of the city of Seattle, for taxes assessed and levied by the city for the year 1891. Appellants also claim ownership under the provisions of Bal. Code, § 5504 (P. C. § 1161), as follows:

“Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: *Provided, however,* If any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section.”

It is admitted by the pleadings that the lands in question are vacant and unoccupied lots. We shall consider these two

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claims of the appellants in their order. The record shows that the tax deeds are based upon a levy and sale for taxes assessed by the city of Seattle, under the freeholders charter of 1890, which provided for a summary system of levy and collection of taxes, unlike the system now in force. In order to divest the owner of his title to the land under such proceedings, the requirements of the statute must be strictly followed. *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73. The evidence shows, and the court found, that the provisions of the charter were not followed in several important and vital particulars. For example, the charter provided that the assessor, between April 1 and July 1, should prepare a roll of the real property with the valuation thereof, and file the same with a certificate of its correctness with the city clerk. The evidence shows that this was not done, but instead the city purchased a roll from the county. It was not filed with the clerk until July 30. The charter required the board of equalization to meet on August 1, and that five days' notice should be given thereof. No such notice was given, and the board did not meet until two weeks later. The charter required the city comptroller to prepare a list of delinquent taxes and to fix his warrant to such delinquent list, directing the city treasurer to proceed to advertise and sell the land for delinquent taxes. The evidence shows that no such warrant was issued or attached; and also other irregularities of this kind. We are satisfied that the tax deed issued in this case was entirely void, and even if the deed is *prima facie* evidence of the regularity of the proceedings as appellants now contend, still enough is shown and found by the court under the undisputed facts to show that the deed is void because of irregularities above stated. *People v. Hastings*, 29 Cal. 450; Black, Tax Titles (2d ed.), § 201.

Appellants next contend that, even if the tax deed is void, still it is sufficient with the payment of taxes for seven years to vest the legal title in them under the provisions of § 5504 above quoted. The facts in regard to the payment of taxes

are that respondent permitted the general state and county taxes to become delinquent for the years 1895 and 1896. She afterwards purchased certificates of delinquency for those years in the name of her son, because of certain defects in her title. She afterwards paid the taxes for the years 1897, 1898 and 1899, and took receipts in the name of her son. In February, 1902, one Lambert, who then held the tax title, redeemed from the county treasurer the certificates of delinquency standing in the name of respondent's son, and also the taxes purporting to have been paid by him for the years 1897, 1898 and 1899, and on the same day paid the taxes for the years 1900 and 1901. Appellants afterwards paid the taxes for the years 1902 and 1904. Respondent paid the taxes for the year 1903, and on June 7, 1903, while Mr. Lambert still held the tax title, she tendered to him, with interest, the amount which he had paid for the redemption of the certificates of delinquency and taxes paid by him, and afterwards tendered to appellants all taxes paid by them and their predecessors, with interest. It will be seen that the appellants and their predecessor, Mr. Lambert, have paid seven years' taxes, but the first payment of taxes, if a redemption of a tax certificate may be said to be a payment of taxes within the statute above quoted, was made in 1902. This action was brought in 1906, so that only four years elapsed after the first payment of the taxes. The supreme court of Illinois has construed a statute identical with ours to mean that, in order to constitute a bar, seven years must elapse between the date of the first payment and the commencement of the suit. *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60, and cases there cited. We think that construction is undoubtedly correct.

We find no error in the record, and the judgment is therefore affirmed.

HADLEY, C. J., ROOT, CROW, FULLERTON, DUNBAR, and
RUDKIN, JJ., concur.

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Opinion Per MOUNT, J.

[No. 6280. Decided March 30, 1907.]

F. X. LA BOUNTY *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

DEDICATION—PLAT—CONSTRUCTION—REVOCATION BY SUPPLEMENTAL PLAT. Where an owner of land in dedicating an addition to a city, filed a plat designating his south boundary as the center line of a street sixty-six feet wide, when in fact the street and lots as staked out diverged from such boundary line, the lots being 33 feet from the line of the street at one corner and 44 feet distant at the lots in question, the excess is part of the street and is not to be added to the lots where the plat describes the streets as sixty-six feet in width; and the owner cannot, after acceptance of the plat, show a contrary intention or alter the dedication by the filing of a supplemental plat.

BOUNDARIES—EVIDENCE—SUFFICIENCY. Evidence of one purchasing a lot according to the recorded plat, that she saw a stake at one corner of the block, is not sufficient to show a corner at variance with the plat where the stake was not identified in any way.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 23, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action against a city to recover the value of a strip of land taken for street improvements. Reversed.

Scott Calhoun and *O. B. Thorgrimson*, for appellant.

Guie & Guie, for respondents.

MOUNT, J.—Respondents brought this action to recover from the city of Seattle the value of a strip of land, seven feet wide, across the south end of two lots in said city. This strip was taken and used by the city for the purpose of street improvements. The city claims the strip as a part of the street. Respondents claim the strip as a part of their lots.

¹Reported in 89 Pac. 480.

This is the main question in the case. The case was tried to the court without a jury, and the court found that the strip of land was a part of the lots, and entered a judgment against the city for its value. The city appeals.

There is no dispute in the evidence. The facts are as follows: On July 30, 1875, one D. T. Denny was the owner of government lots 1 and 2 in section 29, township 25 north, range 4 east, W. M., situated within the limits of Seattle. On that day Mr. Denny executed, and filed in the office of the county auditor of King county, a town plat comprising all of lot 2 and part of lot 1, of said section 29. This plat was designated as "D. T. Denny's Second Addition to North Seattle." The lots and blocks upon the plat were regularly numbered, and the size of the lots designated as sixty by one hundred and twenty feet. The streets were named, and the widths stated as sixty-six feet; the alleys as sixteen feet wide. The plat was duly acknowledged and recorded. The south line of the plat is the center line east and west through section 29. This line was the south line of government lot 2 of said section, and the south boundary of Mr. Denny's land. The street along the south of the plat was named Grange street, but is now called Roy street. It is shown on said plat as a street sixty-six feet wide. Shortly after the plat was filed, Mr. Denny sold lots which were described as being in D. T. Denny's Second Addition to North Seattle. On June 15, 1882, Mr. Denny sold the lots in question, and described them as "Lots 1 and 2 in block numbered 6, in David T. Denny's Second Addition to North Seattle, as recorded with the records of King county." Subsequently respondents acquired title to these lots. On March 15, 1889, Mr. Denny filed another plat of the same land, which plat is designated "A supplementary plat of D. T. Denny's Second Addition to North Seattle." This last-named plat describes the southwest corner of block 1 as "thirty-three feet north and thirty-three feet east of the quarter section corner on the west side of said section 29." Grange (Roy) street shows thereon as

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only thirty-three feet wide. The streets within the plat are designated as sixty-six feet wide, and "all alleys sixteen feet wide. Lots are sixty by one hundred and twenty feet." The dedication of this supplementary plat is as follows:

"Know all men by these presents: That we, David T. Denny and Louisa Denny, husband and wife, did on the 30th day of July, A. D. 1875, execute and acknowledge a certain plat of Second Addition to North Seattle and did on July 30th, 1875, file the same for record in the office of the auditor of King county, W. T., which plat was thereafter recorded on page 111 of Vol. 1 of the plat of records in the office of said auditor. And whereas the said plat on its face failed to show the location and course of the streets thereon; and whereas, the location and course of said streets as indicated on the within plat is identical with the location and course thereof as intended to have been indicated on the said original plat; Now, therefore, in order to validate and make perfect the said original plat, and in order to make the proper record of the location of said streets, blocks, and lots, we have this day declared the within plat, and do hereby dedicate to the use of the public forever as public highways, all and singular, the streets and alleys shown on the within plat."

The record conclusively shows that the street line of the lots and blocks as platted upon the ground is not quite parallel with the east and west center line of section 29. So that, while the southwest corner of block 1 was thirty-three feet north of that line, the lot line lying east of that corner diverged until at the southeast corner of the next block which was numbered 6, Grange street was forty-four and two-tenths feet wide. After Mr. Denny had filed his original plat, he evidently discovered that the streets bordering the outside of the addition were not actually sixty-six feet wide, because he did not own that much land bordering on the outside of the plat but that the streets were only thirty-three feet wide; and in order to set the original plat right in this respect, he made and filed another plat which he designated a supplementary plat. Respondents own lots 1 and 2, being one hundred and twenty feet square, on the southeast corner of block 6 located

at the intersection of Grange (Roy) street and Howard avenue. It is not claimed that the city took any part of the one hundred and twenty feet of respondents' lots, but respondents claim that, because the street is only thirty-three feet wide in front of their lots, they are the owners of the space between their lots as described in their deed and the north line of the street, making the lots one hundred and thirty-one feet long instead of one hundred and twenty feet. This contention of respondents would probably be correct if Mr. Denny was authorized to modify his original plat by a subsequent one, and thereby vacate a street or part of a street already dedicated. We are satisfied, however, that he had no such authority, even if he intended to do so. The authorities are clear to the effect that, where a plat is filed and streets dedicated to the public and accepted, and lots sold with reference thereto, the dedicatory cannot afterwards, at his own will, change the plat by vacating a street or any part of one. Elliott, Roads and Streets (2d ed.), § 119; 2 Dillon, Municipal Corporations (4th ed.), § 632; *Meier v. Portland Cable R. Co.*, 16 Ore. 500, 19 Pac. 610, 1 L. R. A. 856; *City of Denver v. Clements*, 3 Colo. 472; *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215; *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743.

If Mr. Denny owned the land upon which Grange (Roy) street was originally platted to the extent of sixty-six feet, he certainly was not authorized to revoke that dedication at his own will fourteen years later, after the plat had been accepted. The fact is, of course, that he intended to, and did, dedicate for a street on the south side of the original plat as marked upon the ground all the land he owned there to the extent of sixty-six feet in width. He could not dedicate land he did not own. He, no doubt, supposed, at the time the supplementary plat was made, that the line of the lots was parallel with the section line, and that the street was only thirty-three feet wide for its whole course, and therefore filed the supplementary plat to show his original intention in that respect. Even if this supplementary plat was competent evi-

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Syllabus.

dence for the purpose of showing that fact, it was not competent to show any change in the original plat under the rule above stated. One of the respondents testified that, at the time they purchased the lots in question, she saw a stake at the southeast corner of the block, and that the two lots were fenced from that stake as the original corner. But this stake was not identified in any way as an original stake marking the corner as actually laid out. The evidence seems to be conclusive that the lots as originally platted were sixty by one hundred and twenty feet in size, and that the respondents' lots as platted and marked upon the ground were no larger than that, and also that Grange or Roy street in front of respondents' lots was actually forty-four feet wide. We conclude, therefore, that the strip of land in question was and is a part of the street, and that respondents are not entitled to recover in this case.

The judgment is therefore reversed and the cause ordered dismissed.

HADLEY, C. J., ROOT, FULLERTON, RUDKIN, CROW, and DUNBAR, JJ., concur.

[No. 6420. Decided April 1, 1907.]

GEORGE McCORD *et al.*, *Respondents*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.¹

EVIDENCE—DECLARATIONS OF THIRD PERSONS—ADMISSIONS—ACQUIESCENCE IN STATEMENTS. Where two women, the plaintiff and another, had been thrown from a buggy by a street car collision, evidence of a statement as to the blame for the accident, made by plaintiff's companion in her presence immediately upon regaining consciousness, is not admissible as an admission by plaintiff on the ground that it was not contradicted, where it appears that the plaintiff was seriously injured and hysterical at the time.

¹Reported in 89 Pac. 491.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 18, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action for personal injuries sustained in a collision with a street car. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant, cited: *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115; *Rice*, Evidence, pp. 424, 468; 2 *Wigmore*, Evidence, p. 1255; *Holston v. Southern R. Co.*, 116 Ga. 656, 43 S. E. 29; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *Olivier v. Louisville etc. R. Co.*, 43 La. Ann. 804, 9 South. 431; *Givens v. Louisville etc. R. Co.*, 24 Ky. Law 1796, 72 S. W. 320; *Over v. Missouri etc. R. Co.* (Tex. Civ. App.), 73 S. W. 535; *Springer v. Byran*, 137 Ind. 15, 36 N. E. 361, 45 Am. St. 159, 23 L. R. A. 244; *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64; *Pierce v. Goldsberry*, 35 Ind. 317; *Mallen v. Boynton*, 132 Mass. 443.

T. N. Tallentire and McBride, Stratton & Dalton, for respondents, cited: *Saunders v. City etc. R. Co.*, 99 Tenn. 130, 41 S. W. 1031; *Gulf etc. R. Co. v. Montgomery*, 85 Tex. 64, 19 S. W. 1015; *State v. Foley*, 144 Mo. 600, 46 S. W. 733; *Scott v. St. Louis etc. R. Co.*, 112 Iowa 54, 83 N. W. 818; *Hammond etc. R. Co. v. Spyzchalski*, 17 Ind. App. 7, 46 N. E. 47; 16 Cyc. 956; 2 *Wharton*, Evidence, § 1136; *Moore v. Smith*, 14 S. & R. (Pa.) 388; *Vail v. Strong*, 10 Vt. 457; *Commonwealth v. Kenney*, 12 Met. (Mass.) 235; *Pierce's Adm'r v. Pierce*, 66 Vt. 369, 29 Atl. 364; *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. 424; *Allison v. Barrow*, 3 Cold. (Tenn.) 414, 91 Am. Dec. 291; *Jackson v. Builders' Wood-Working Co.*, 36 N. Y. Supp. 227; *Ware v. Ware*, 8 Me. 42; *Cabiness v. Holland* (Tex. Civ. App.), 30 S. W. 63.

MOUNT, J.—The respondents recovered a judgment against appellant, on account of personal injuries sustained by Mrs. McCord. The appeal is from that judgment. The facts show that Mrs. McCord and a companion, Mrs. DeWitt, were driving in a buggy along Seventh avenue in the city of

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Seattle. Appellant maintains a double line of street railway upon that street. The ladies were driving a single horse, parallel with the street railway line. While doing so they collided with another vehicle, and their horse became frightened and reared and pranced back and forth across the car tracks, but moving forward all the time and at no time clear of the track. While the horse was conducting himself in this way, a street car approached at an unlawful rate of speed. The position of the buggy and the fact that the horse was not under control were apparent to the motorman, but the speed of the car was not checked, and the ladies being unable to control the horse so that the buggy would clear the track, the car struck the buggy and threw the ladies to the ground. As a result Mrs. McCord was seriously injured, but was not rendered unconscious. She was hysterical until she was taken away. Mrs. DeWitt was rendered unconscious at first, but after being placed to one side of the street, she regained her consciousness. The defense was that the horse and buggy were not upon the railway tracks, but were standing still at the corner of the street; that just before the car came near, moving less than six miles per hour, the horse suddenly backed the buggy in front of the car, too late for the motorman to stop.

During the trial the appellant called a witness who, after testifying that he was on the car at the time of the collision, that he immediately left the car and went with other bystanders near to where the ladies were, that he saw both of the ladies, and that Mrs. McCord was talking, was asked this question: "What, if anything, was said about who was to blame?" Answer: "Well, I stood there for a moment, and the lady that lay on the grass, when she came to she rose up and got up on her feet and was fixing her hair, as ladies would, you know, and her hat, and the first words I heard her speak at all was"— Mr. Stratton, interrupting: "Just a moment. This, as I understand, refers to statements made by Mrs. DeWitt." Mr. Dovell: "In the presence of Mrs. McCord." Mr. Strat-

ton: "We object to the statement as being incompetent, irrelevant, and immaterial. Mrs. DeWitt could not make a statement, if she made it, which would bind the plaintiff in this case." After some discussion, counsel for appellant then said: "I offer to show by this witness . . . that Mrs. DeWitt made a statement at that time in the presence of Mrs. McCord saying who was to blame for this accident, and Mrs. McCord stood there and tacitly assented to it." The court excluded the evidence. The correctness of this ruling is the only question presented.

The general rule upon this question is correctly stated, we think, in 16 Cyc., page 956, as follows:

"A statement made in the presence of a party, but not connected with his conduct at the time when it was made, is mere hearsay, and not evidence against him of any fact narrated in such statement. But where a definite statement of a matter of fact is made in the presence or hearing of a party so that he understands it, in regard to facts affecting him or his rights, and the statement is of such a nature as to call for a reply; and the party addressed is possessed of knowledge concerning the matter referred to, enabling him to reply if inclined to do so; and the nature of the statement, the right to information of the person who makes it, or other circumstances are such as to render a reply proper and natural, the statement, in connection with a total or partial failure to reply, is admissible evidence tending to show a concession of the truth of the facts stated."

And in Greenleaf on Evidence, vol. 1 (16th ed.), § 197, as follows:

"But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence."

It has been held that declarations similar to the one here sought to be proven were conclusions and not statements of

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fact, and therefore not admissible. *Scott v. St. Louis etc. R. Co.*, 112 Iowa 54, 83 N. W. 818; *Hammond etc. R. Co. v. Spyzchalski*, 17 Ind. App. 7, 46 N. E. 47; *Saunders v. City etc. R. Co.*, 99 Tenn. 130, 41 S. W. 1031; *Railway v. Montgomery*, 85 Tex. 64, 19 S. W. 1015. But if the statement here sought may be held to be the statement of a fact, we think the witness testified to enough to take the evidence without the rule when he said, referring to Mrs. DeWitt: "When she came to she rose up and got up on her feet and was fixing her hair, as ladies would, you know, and her hat, and the first words I heard her speak at all was." The witness here means that Mrs. DeWitt had been unconscious and made a declaration soon after or immediately upon regaining consciousness. It is conceded, apparently, that Mrs. McCord and others had been working with Mrs. DeWitt to bring her back to consciousness. Under such circumstances a contradiction by Mrs. McCord would hardly be natural, and therefore would not be required, even if Mrs. McCord heard and understood what Mrs. DeWitt had said. But in addition to this, Mrs. McCord herself was seriously injured and hysterical. She had been assisting to bring Mrs. DeWitt to her senses. It would be surprising under these conditions if Mrs. McCord fully understood Mrs. DeWitt's statements, if any were made. She would not be required to give heed to statements she did not fully comprehend. *Schilling v. Union R. Co.*, 77 App. Div. 74, 78 N. Y. Supp. 1015. We are of the opinion, therefore, that the trial court properly excluded the evidence.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

Root, J., having been of counsel, took no part.

[No. 6456. Decided April 1, 1907.]

THE CITY OF SPOKANE, *Respondent*, v. SECURITY SAVINGS
SOCIETY *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS. A reassessment for a local improvement cannot be made, under Bal. Code, § 1139, unless the original assessment is in fact invalid.

SAME—VALIDITY OF ASSESSMENT—PROPERTY LIABLE. The omission of state lands from assessment for a local improvement does not render the assessment void, where no express statutory authority existed for the assessment of state lands.

SAME—APPORTIONMENT TO CITY. Under a charter requiring all land, liable by law to contribute to the improvement, to be assessed therefor according to benefits, the city cannot be charged with the proportion falling to state lands in the district, where there is no authority to assess state lands, and the apportionment of such portion to other property in the district is not unequal or invalid, where it does not appear that any such property was assessed in excess of benefits received.

TAXATION—PAYMENT TO PROTECT LIEN. Payment by a city of general taxes in order to protect a supposed prior local assessment lien, is not voluntary, but is a payment in good faith, and entitles the city to a lien for the amount of the taxes paid.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered June 8, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a city to foreclose a local assessment lien. Reversed.

P. F. Quinn and *P. C. Shine*, for appellants.

Lester P. Edge and *J. M. Geraghty*, for respondent.

Crow, J.—This action was brought by the city of Spokane against the Security Savings Society and others, to foreclose a street assessment on lot 4, in block 1, Nosler's Home Addition. The general taxes for the years 1900,

¹Reported in 89 Pac. 466.

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1901, 1902 and 1903 being delinquent, the same were paid by the city, to protect its assessment lien, and it now asserts and seeks to foreclose an additional equitable lien therefor in this proceeding. The undisputed facts are, that on August 4, 1891, the city council, by ordinance A68, provided for the grading and improvement of Sprague street, now Sprague avenue, and created an assessment district therefor; that shortly thereafter a special assessment was levied on all lots and parcels of land within such district, except certain abutting real estate in school section 16, township 25, north, of range 43, east, W. M., which belonged to the state of Washington; that the entire frontage of lots and lands, located in the district and abutting upon the improved portion of the street, was 13,139.16 feet, of which 4,269.8 feet were in the school section; that no portion of the school section was assessed; that the entire cost of the improvement was assessed to the remaining portions of the abutting property; that thereafter, by ordinance A489, passed September 4, 1894, as amended by ordinance A651, passed June 16, 1896, the city of Spokane again created an assessment district, including therein the same lots and parcels of land which had been included in the original district, and provided for a reassessment to defray the original cost of the improvement; that shortly thereafter and in pursuance thereof, a reassessment was made, payable in ten annual installments, the first maturing on January 1, 1897; that lot 4 was reassessed in the total sum of \$122.49; that this reassessment was ordered by the city on the theory that the original assessment was invalid; that no part of the reassessment on lot 4 has been paid, and that the original assessment has been barred by the statute of limitations.

The city, by its pleadings and evidence, contended that the original assessment of 1891 was invalid, and that, by reason thereof, it was authorized to make a reassessment under Bal. Code, § 1139 *et seq.* (P. C. § 3624), Laws of 1893, p. 226. The defendants, by their pleading and evi-

dence, contended (1) that the original assessment was valid; (2) that the reassessment was invalid, the city being without any authority to make the same, and (3) that the payment of the delinquent general taxes by the city was voluntary and cannot be recovered in this action. The trial court made findings in favor of the city, and entered a decree foreclosing its lien for the reassessment, and also for the delinquent general taxes which it had paid. The defendants have appealed.

Although making many assignments of error, the appellants present but two questions for our consideration: (1) Did the trial court err in holding the original assessment of 1891 invalid; (2) did the trial court err in allowing the city a lien for the delinquent general taxes paid by it. The city properly concedes that it could not legally reassess unless the original assessment was void. It will thus be seen that the fundamental question in this case is the validity of the original assessment. The trial court held it invalid, and that the reassessment was authorized and valid. There is nothing in the record to show that the original assessment has at any time been set aside, annulled, or declared void, directly or indirectly, by the judgment or decree of any court. It seems to have been abandoned by the city authorities as invalid. The respondent alleged several grounds of invalidity, but the only one upon which it relied at the trial, and now relies, is that the action of the city in assessing the entire cost of the improvement on a part only of the abutting lots or lands was oppressive, unjust, inequitable, and therefore void. In other words, that the failure to assess that portion of the state's land located within the district constituted a fatal defect. While the city practically concedes that no assessment on the school section could have been collected from the state, it nevertheless contends that it was without authority or power to impose upon the other property of the district that proportion of the cost which would ordinarily have been assessed against the state property, had it belonged

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to private individuals. Its theory is that the state's proportion of the cost should be paid by the city, while the remainder thereof should be assessed upon the other property of the district which was subject to assessment. Under § 1139, *supra*, the authority of the city to make a reassessment depends on the invalidity of the original assessment. It has been held by this court that no prior adjudication of such invalidity is a necessary condition precedent to the exercise of the city's authority to reassess. *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

It is nevertheless necessary that the original assessment shall, as a matter of law, be invalid to authorize a reassessment. In the absence of any showing to the contrary, it will be presumed that the proceedings of the city authorities in making the original assessment were regular, when, as in this instance, they are attacked in a collateral proceeding. If upon their face they do not appear to be void, and no showing of jurisdictional defects is made, they must and will on collateral attack, stand as valid and regular. In this action the respondent city collaterally attacks the original assessment, while the appellants collaterally attack the reassessment, claiming it to have been made without authority. If the records upon their face fail to disclose some lack of jurisdiction, or authority to make the original assessment, or some fatal defect in the procedure, then such original assessment must stand as valid, in which event the reassessment would fail for want of authority in the city to make and enforce the same. We fail to understand how the first assessment was invalidated by the mere omission of the state lands therefrom. The respondent has cited no charter or statutory authority which, in the year 1891, conferred upon it the power to assess state lands. In the absence of express statutory authority, the city could not subject lands of the state to a special assessment for local improvements. Authority

therefor is not conferred by a statute which in general terms delegates power to the city to levy special assessments upon private property benefited by the improvement. 25 Am. & Eng. Ency. Law (2d ed.), pp. 1186-7. Hamilton, Law of Special Assessments, § 313.

The city, however, contends that, as the state land was not assessed, and the entire cost of the improvement was imposed upon the other portions of the district, the assessment thus made was unjust, inequitable and oppressive on such portions, and therefore void. Section 61 of the charter of Spokane, in force at the time of the making of the original assessment, reads as follows:

"The city of Spokane Falls shall have power to construct and repair, or cause to be constructed and repaired, sidewalks; and to curve, grade, pave, plank, macadamize, and gutter any street or streets, highway or highways, alley or alleys therein, or any part thereof, and to levy or collect a special tax or assessment on all lots and parcels of land on each side of such street or streets, alley or alleys, highway or highways, or any part thereof to the center of the block, sufficient to pay the expenses of such improvement, and for such purpose may establish assessment districts consisting of all lots and parcels of land on each side of a portion of the whole of any such street or streets, alley or alleys, highway or highways, and to the center of the block on each side thereof. . . . and all the property within such assessment district liable by law to contribute to the improvement of such street, alley or highway, shall be assessed therefor equally and ratably in proportion to the frontage thereof upon such street. . . ."

This section provided for an assessment on all property in the district *liable by law to contribute to the improvement*. All such property was assessed. The state property, not being liable, was not assessed.

It has not been made to appear that any lots or parcels of land liable to assessment were either arbitrarily or by mistake relieved from assessment, and no showing has been made that the original assessment has in any instance exceeded the benefits conferred. In the absence of any such showing, the

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presumption arises, and will be indulged by this court, that all lots liable to assessment were included and that the benefits conferred exceeded, or at least equaled, the assessment imposed. It was necessary to pay for the cost of the improvement in some manner. None of it could be collected from the state and the respondent has cited us to no authority which, in the year 1891, conferred upon it the power to pay from its general funds that proportion of the cost which would ordinarily have fallen to the state. Nor has the city satisfactorily explained why, under the law then existing, the entire cost of the improvement could not have been assessed upon all lands in the district liable to assessment, as long as the amount charged to any one lot or tract did not exceed the benefits conferred. The original assessment has never been attacked in any direct proceeding. On the showing made, we cannot do otherwise, in this collateral proceeding, than to presume and hold that the original assessment was regular and valid, no jurisdictional or vital defects appearing. This holding leads to the conclusions, that the city had no authority to make any reassessment; that the reassessment it now seeks to enforce is void, and that it does not create any valid lien on the appellants' lot.

The appellants further contend that the trial court erred in awarding the respondent a lien for the delinquent taxes for the years 1900, 1901, 1902, and 1903, which it paid. We do not think this contention can be sustained. The payment was not a voluntary one. It was made by the city for the purpose of protecting a local assessment lien, which it honestly believed it held and which it was asserting and attempting to enforce. The payment was made in good faith and not as an investment. *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *Dunsmuir v. Port Angeles Gas W., El. L. & P. Co.*, 30 Wash. 586, 71 Pac. 9; *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. 367; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953.

The judgment of the superior court is reversed, and the cause remanded with instructions to enter a decree adjudging the local assessment lien claimed by the respondent to be invalid, but awarding the respondent a lien upon appellants' lot for the delinquent general taxes paid, with interest thereon from the several dates of payment. A further decree will be entered fixing a time within which such taxes shall be paid by the appellants, and directing that, if they be not so paid, an order of sale issue on behalf of the respondent for the enforcement of its lien therefor. The appellants will recover costs in this court, and the respondent in the superior court.

HADLEY, C. J., RUDKIN, MOUNT, DUNBAR, FULLERTON, and ROOT, JJ., concur.

[No. 6584. Decided April 1, 1907.]

ROBERT A. TRIPPLE, *Appellant*, v. GEORGE B. LITTLEFIELD
*et al., Respondents.*¹

BROKERS—REFUND—PRINCIPAL AND AGENT—PERSONAL LIABILITY OF AGENT. Real estate brokers, acting as agents of a disclosed principal, the owner of land, are not personally liable to a purchaser of the land, upon breach of the owner's contract to convey, for a refund of earnest money paid to the agents, under the agents' agreement to refund the same if the sale was not approved by the owner, where the sale was approved by the owner and the money paid over to him by the agents, and the purchaser knew, as shown by his original complaint, that the brokers were acting as agents of the owner.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 7, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover earnest money advanced on a prospective purchase of real property, and for damages. Affirmed.

¹Reported in 89 Pac. 493.

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Opinion Per HADLEY, C. J.

E. H. Kohlhasse, John E. Humphries, and George B. Cole,
for appellant.

L. T. Turner, for respondents.

HADLEY, C. J.—This action was brought to recover the sum of \$500 advanced on account of a prospective purchase of real estate which was not completed, and also to recover damages. The money was paid by the plaintiff to the defendants George B. Littlefield and William H. Lewis, doing business under the firm name of Lewis-Littlefield Co. At the time of the payment the following written receipt was delivered to plaintiff:

“Seattle, Wash., Jan. 12, 1906.

“Received from R. A. Tripple five hundred and no-100 dollars, deposit on purchase price of lot 11, block 290, Seattle Tidelands, at \$16,000.00—\$7,500 to be paid within 10 days, balance of \$8,000 on or before one year at six per cent interest.

“If given for earnest money, the conditions on the back of this receipt are referred to and made a part hereof.

LEWIS-LITTLEFIELD Co.,

“\$500.00.

By Geo. B. Littlefield, Manager.”

On the back of the receipt was indorsed the following:

“Rents and interest on mortgages, if any are to be apportioned from date deed is delivered.

“An abstract of title is to be furnished and five days allowed for examination.

“If the title to the said premises is not good, or cannot be made good within 30 days, or if the owner does not approve the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to the said premises is good, and the sale is approved by the owner, and the purchaser fails to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to Lewis-Littlefield Co.

“The property is to be conveyed by good and sufficient deed of conveyance, free and clear of all liens and encumbrances

of every nature whatsoever, except special assessments or installments not yet due.

"Time is of the essence of this contract.

"LEWIS-LITTLEFIELD Co., Agents,

"By Geo. B. Littlefield, Manager."

The complaint as originally filed was against Lewis-Littlefield Co. and Marcus Talbot. The allegations were, that the plaintiff purchased from the defendants the lot mentioned in the receipt for the sum of \$16,000, and paid thereon the sum of \$500 as earnest money; that said sum was paid to Lewis-Littlefield Co. as agents of Marcus Talbot, and that the written contract of purchase in terms as above set forth was then executed. It is further alleged that the plaintiff has at all times been ready and willing to perform his part of the contract, but that he was prevented from doing so by the refusal of the defendants to comply with the terms of the agreement, in that they refused to grant him five days for the examination of the abstract of title, and demanded that he accept possession of the abstract subject to examination within three days, instead of within five days as provided by the written agreement; that the plaintiff refused to do so, and that he has been damaged in the sum of \$1,000. He seeks to recover the \$500 advanced and \$1,000 as damages.

The defendants, who constitute the firm of Lewis-Littlefield Co., answered, admitting the written contract and the payment, but alleging that the contract was made by them as agents of Marcus Talbot; that in all the transactions referred to in the complaint and in making the contract, they acted as the agents and brokers of said Talbot, and had no interest therein except the right to claim from said Talbot a commission of \$500 in the event the sale was accomplished by them as such brokers; that these facts were at all times well known to the plaintiff; that upon the receipt of the said \$500 they paid the same to Talbot, and that the plaintiff well knew of said payment when this action was commenced.

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The cause was tried by the court without a jury. The defendant Marcus Talbot did not appear. The complaint as originally filed not only made said Talbot a defendant, but also alleged, as before stated, that the plaintiff paid the \$500 to Lewis-Littlefield Co., "as agents of Marcus Talbot." At the trial the court permitted the plaintiff to amend the complaint by omitting the above-quoted words, and the averment as amended was that the payment was made to Lewis-Littlefield Co. The trial resulted in a judgment for the defendants Lewis-Littlefield Co., from which the plaintiff has appealed.

The court found that the contract was made by respondents as agents of Marcus Talbot, the owner of the property; that the sale was approved by the said owner; that the agents paid to him the \$500, and that he received it on account of the sale; that respondents fully disclosed to appellant, at the time of making the contract, that they were acting as agents of Talbot, and not otherwise, and that appellant entered into the contract with full knowledge of the ownership of the property; that after respondents had paid the money to Talbot, the appellant, claiming that the contract had not been complied with by the furnishing of an abstract and the allowance of five days for its examination, demanded from respondents the return of the \$500. Appellant assigns error upon these findings, but we find them to be supported by the testimony that was before the court.

It is contended by appellant that the contract was in writing; that it provided for the forfeiture of the money to respondents themselves, and that the covenants were personal to themselves. The principle is invoked that when the covenants are personal, the mere addition of the word "agent" will not change their character; and also that a contract executed by an agent in his own name, merely describing himself as agent, will bind him individually. It is further contended that, in order to bind a principal and make an instru-

ment his contract, the instrument must purport to be a contract of the principal, and his name must be inserted in and signed to it. Whatever may be said of the correctness and general application of appellant's argument and of his cited authorities, we think the result reached in this case was correct under the evidence. Appellant cannot now use the written contract as a shield to protect him from the disclosure of the fact that he knew he was dealing with respondents merely as agents of Talbot, the owner, when by his own act he first disclosed that fact in the record of this case. He deliberately alleged in his sworn original complaint, which was verified by himself, that he paid the money to respondents "as agents of Marcus Talbot," and then made Talbot a party to his suit.

Upon the trial respondents objected to the admission of testimony, on the ground that the complaint did not state facts sufficient to constitute a cause of action against them. The objection was sustained and thereupon the amendment was made by omitting the words which characterized respondents as agents, the effect of the amendment being to charge them as principals. Respondents afterwards introduced in evidence this original complaint as it was verified by appellant. No explanation whatever was offered, and it stands in the case as the sworn admission of appellant that he dealt with respondents as agents of Talbot, and that he sought recovery from Talbot. This admission is sufficient to determine the case against appellant, so far as respondents are concerned, since when they received the money as agents it became their duty to pay it over to their principal, and if appellant is entitled to recover by reason of some act of that principal, he must sue him as the one who is liable. The admission of appellant not only stands unexplained, but its truth is emphasized by appellant's own testimony. He testified that the commission which respondents were to receive for the sale was to be divided between them and himself. He was acting at least partially for others in the purchase of the

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property. The admission is also in harmony with the written contract itself, since the contract affirmatively states that it is made subject to the approval of the owner, and this part of it was specifically signed by respondents as "agents." The contract itself thus doubly disclosed that there was a principal, and appellant's admission shows that he knew who that principal was and dealt accordingly with respondents as the agents of a disclosed principal.

The following statement of general principles is applicable under such circumstances as are disclosed by the record:

"In general, when a person acts and contracts avowedly as the agent of another who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal, and involve no personal liability on the part of the agent." 1 Am. & Eng. Ency. Law (2d ed.), page 1119.

See, also, numerous cases cited in the notes. The text of the same work, on the following page, further says that the presumption is that an agent always intends to bind his principal and not himself, but that if, when he acts for a principal he openly pledges his own credit, he may obligate himself to the performance of a contract that would otherwise devolve upon his principal. The record here does not show that respondents so openly pledged themselves. It is argued that such an obligation is established because the indorsement on the contract states that, in the event of appellant's failure to perform, the money shall be forfeited to respondents, the principal not being mentioned in that connection. Such a conclusion does not follow under the facts of this case. Appellant knew that respondents acted for a disclosed principal; that they received the money for such principal, and that any forfeiture, although stated nominally to be to the agents, was in fact to and for the benefit of the principal. From the whole record we think the court was correct in concluding that the respondents merely stood in the position of agents of a

disclosed principal, and that there is no liability on their part.

The judgment is affirmed.

RUDKIN, FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

[No. 6495. Decided April 2, 1907.]

ABNER MCKINLEY, *Respondent*, v. MINERAL HILL CONSOLIDATED MINING COMPANY, *Appellant*.¹

CORPORATIONS—NOTES—OFFICERS—AUTHORITY AND CONSIDERATION—PLEADING. A complaint alleging an indebtedness by a corporation, and the execution and delivery of a note therefor, reciting that it was for value received, sufficiently alleges consideration for the note and execution by the corporation without stating the authority for the execution, which is matter of defense.

SAME—APPARENT AUTHORITY. Where a note was executed by the president and general manager of a corporation in the presence of its officers and board of trustees, the corporation is liable thereon, unless it shows affirmatively that the act was unauthorized.

SAME—RATIFICATION—RECEIPT OF BENEFITS. A corporation cannot set up want of authority in its president to execute a note, where it had received benefits by way of money advanced and services rendered for which the note was given.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered June 18, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

M. J. Gordon and *Charles A. Murray*, for appellant.

Albert G. Starkey and *Clyde H. Belknap*, for respondent.

HADLEY, C. J.—This is a suit to recover upon a promissory note. The complaint avers that the defendant, a corporation, being indebted to the plaintiff, made and delivered to the plaintiff its promissory note for the sum of \$2,500.

¹Reported in 89 Pac. 495.

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The copy of the note which appears in the complaint states that the note was given for value received, and the signature thereof is as follows: "Mineral Hill Consolidated Mining Co., by Arthur A. Dunphy, Pres." The usual averments as to ownership and nonpayment of the note are made, and judgment is demanded for the full principal sum, with interest and attorney's fees. The answer admits the corporate character of the defendant, but denies the indebtedness, the execution of the note, and all other material allegations of the complaint. It is also affirmatively alleged that, if the plaintiff ever received from anyone such a promissory note as is set forth in the complaint, he had full knowledge that the same had been made and was delivered to him without any authority to any person to sign and deliver it in behalf of said corporation; that the corporation never received any consideration for the note, never authorized its execution and delivery, and never ratified the same. The cause was tried before the court without a jury, and resulted in a judgment for the full amount demanded, from which the defendant has appealed.

The several assignments of error involve the contention that neither the authority of the corporation to execute the note, nor that the corporation received any benefit as a consideration for it, was shown. Objection was first made to the introduction of any evidence, on the ground that the complaint failed to state a cause of action in the particulars above named. The complaint alleged that the corporation was indebted to respondent, that it made and delivered the note to the respondent, and the note itself, which was made a part of the complaint, also stated that it was for value received. The complaint was therefore sufficiently explicit. It squarely alleged that the corporation itself made and delivered the note as its own act. It could not have been so made as the act of the corporation without authority to the one who performed the clerical work of signing it and attaching the corporate seal.

"The acts constituting the cause of action should be alleged as the acts of the corporation; it is not necessary to aver that they were done by and through the authorized agents of the corporation." 5 Ency. Plead. & Prac. p. 92.

The complaint sufficiently alleged an authoritative execution, and want of authority therefore became a matter of defense. *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858; *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216, 21 N. E. 155. It was, therefore, not error to overrule the objection to the introduction of testimony on the ground that authority to execute the note was not alleged. The objection upon other grounds specified was also properly overruled. The averments that the corporation was indebted to the respondent, and that the note was for value received amounted in effect to specific pleading that there was a consideration to support the note. In addition thereto, the written instrument, having been sufficiently pleaded, imported a consideration.

At the trial the evidence showed that the note was executed by the president and general manager of the corporation in the presence of the secretary and other officers of the company. The testimony did not show that the president was not authorized to make the note or that his act was not ratified. No action of the board of trustees in the premises was, however, shown, and appellant contends that, under Bal. Code, § 4255 (P. C. § 7059), such action should have affirmatively appeared before authority to execute the note could have been found. It is true the cited statute provides that the corporate powers of a corporation shall be exercised by a board of trustees; but this court long since held that, when a corporation allows a person in a large measure to control its business transactions, it must be held responsible for his acts in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized. *Carri-gan v. Port Crescent Improvement Co.*, 6 Wash. 590, 34 Pac. 148. See, also, *Saunders v. United States Marble Co.*,

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25 Wash. 475, 65 Pac. 782; *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *West Seattle Land etc. Co. v. Novelty Mill Co.*, 31 Wash. 435, 72 Pac. 69. Furthermore, the evidence showed that the corporation had received the benefits by way of money loaned or advanced by respondent, and by way of his labor and services, which made the consideration for the note. Under such circumstances the corporation will not be heard to say that it neither authorized nor ratified the execution of the note. *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55; *Kirwin v. Washington Match Co.*, 37 Wash. 285, 79 Pac. 928.

We think the judgment is supported by the record before us, and it is therefore affirmed.

RUDKIN, DUNBAR, MOUNT, CROW, ROOT, and FULLERTON, JJ., concur.

[No. 6538. Decided April 2, 1907.]

JOSEPH SESSIONS, *Respondent*, v. H. M. WARWICK,
Appellant.¹

ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—PLEADING AND PROOF. In an action to recover attorney's fees by an attorney who had been discharged, evidence on the part of the defendant that plaintiff did not attend to the taking of certain depositions is inadmissible under an answer alleging a discharge on account of plaintiff's improper conduct in having instigated the case, and where it did not appear that the depositions were necessary.

SAME—DISCHARGE—TRIAL—DIRECTION OF VERDICT. In an action by an attorney to recover on an entire contract for the payment of \$1,000 for services to be rendered in another suit, the jury is properly discharged and judgment rendered for the plaintiff, where the defendant's evidence admits the contract and the balance due, and there was no evidence of any defense to go to the jury; it appearing that the only ground alleged in the answer for discharging the plaintiff was known to the defendant before employing the plaintiff.

¹Reported in 89 Pac. 482.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered March 16, 1906, in favor of the plaintiff after discharging the jury at the close of the testimony, in an action to recover for legal services. Affirmed.

Merritt, Oswald & Merritt, for appellant.

C. H. Neal and Joseph Sessions, for respondent.

HADLEY, C. J.—This is a suit to recover a balance alleged to be due on a contract for the payment of attorney's fees. The complaint avers, that on or about April 1, 1905, the plaintiff and defendant entered into an oral agreement, by the terms of which the defendant employed the plaintiff to appear for him and represent him in a certain lawsuit brought against him in the superior court of Lincoln county by one Morris; that the agreed compensation was \$1,000, which was to be in full for all services to be performed by the plaintiff in connection with said lawsuit in the superior court and in any other court to which the cause might be taken; that on the 13th day of October, 1905, the defendant discharged the plaintiff as his attorney in said cause, informed him that he would not permit him to appear further in the suit and that he would not fulfill his contract to pay plaintiff \$1,000, as he had agreed to do; that the plaintiff has at all times been ready, able and willing to fulfill his part of the contract, and would have done so if he had not been prevented by the defendant; that the defendant has paid \$300 upon the contract, leaving a balance of \$700 still due, for which sum judgment is demanded.

The answer alleges that the contract was to pay \$1,000 in the event the plaintiff's services should be required in both the superior and supreme courts of the state; that it was understood that said sum was not to be paid unless the plaintiff's services became necessary, and unless he should perform the services that would necessarily have to be performed if the case went into both the superior and supreme courts of

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the state; that thereafter the defendant paid \$300 as plaintiff's fees for his services rendered in the cause, and that, becoming dissatisfied with the plaintiff's services by reason of statements made by him to the defendant, he discharged him as his attorney in the cause; that said statements were to the effect that the plaintiff procured the employment of N. T. Caton as the attorney for said Morris to bring said suit against this defendant; that this defendant believed from said conversation that said cause was to some extent, if not altogether, instigated by this plaintiff, and that the trial of the cause could not safely be entrusted to this plaintiff as the attorney for this defendant; that the sum of \$300, which was paid, is ample and full pay for any services rendered by plaintiff as an attorney in the action. The cause came on for trial before a jury and, at the close of all the testimony, the plaintiff moved that the court take the case from the jury and enter judgment against defendant for \$700, on the ground that there was no evidence to go to the jury in support of the defense. The motion was granted. Judgment was accordingly entered, and the defendant has appealed.

It is assigned that the court erred in excluding the testimony of appellant to the effect that respondent did not go to Oregon to see about witnesses and to take depositions. Objection was made to the testimony on the ground that no such ground of defense was pleaded in the answer. We think the objection was properly sustained on that ground. Moreover it was neither shown that such depositions of Oregon witnesses became necessary to the disposition of the case, nor that the respondent would not have performed such service if it had been found necessary and if he had not been discharged.

It is further contended that the court should not have discharged the jury, and that it was error to enter the judgment for respondent. We think there was an entire failure of evidence to support any defense. Appellant in his own

testimony admitted the contract, and the testimony of respondent and also of Mr. Myers was to the same effect as that of appellant. All this testimony showed that the respondent and Mr. Myers were employed by appellant to represent him in all the proceedings in said cause in any and all courts where the cause might be taken, and that each was to be paid the sum of \$1,000; that said sum was to be in full for all services and included the taking of depositions in Oregon if necessary. There was no claim in the testimony that the full sum of \$1,000 was not to be paid in the event services were not required in both the superior and supreme courts. The testimony neither showed that in such event there was to be a stipulated reduction of the \$1,000, nor that there was to be paid merely the reasonable value of services actually rendered. All the testimony was to the effect that the contract was an entire one, by which appellant was to pay the full sum of \$1,000, and respondent was to render all necessary service as one of the attorneys in the case. There was nothing to show that respondent had not fully rendered all necessary services in the case up to the time he was discharged. Appellant's testimony, with reference to respondent's saying that he procured the employment of Caton by Morris in the other suit, was that respondent told him so on the 3d day of April, 1905, and that after that conversation and on the same day, he made the contract of employment. This shows that respondent in no way deceived appellant, and that appellant employed him with full knowledge of what he now asserts as ground for discharge. Under such circumstances the measure of damages is the unpaid balance of the contract amount. *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. 139; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *McElhinney v. Kline*, 6 Mo. App. 94.

We think the court did not err in holding that there was no evidence by way of defense that was sufficient to go to the jury. There was no material conflict in the testimony

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with reference to any issue raised by the pleadings. It was therefore proper to withdraw the case from the jury and to enter judgment. Bal. Code, § 4994 (P. C. § 608), *Squires v. Zumwalt*, 12 Wash. 241, 40 Pac. 986.

For reasons hereinbefore stated, the court did not err in denying a new trial, and the judgment is affirmed.

RUDKIN, DUNBAR, MOUNT, CROW, ROOT, and FULLERTON, JJ., concur.

[No. 6357. Decided April 2, 1907.]

THE STATE OF WASHINGTON, *On the Relation of North Shore Boom and Driving Company, Petitioner*, v. THE SUPERIOR COURT FOR PACIFIC COUNTY, *et al., Respondents*.¹

CERTIORARI—PROCEEDINGS—RECORD—TIME FOR RETURN—LACHES.
 Certiorari to review a judgment of the superior court will be dismissed for want of due diligence in prosecution, where the record was not certified for more than two months after the time fixed therefor in the writ, no application for an extension was asked until nearly one month after the time had expired, and no appearance was made at the date set for considering the extension of time, but a return made sixteen days thereafter without leave; since the return is necessary to confer jurisdiction, and Bal. Code, § 5744, provides that the court shall fix the time, which thereupon becomes the law of the case.

Certiorari to review a judgment of the superior court for Pacific county, Griffin, J., entered July 25, 1906, dismissing a condemnation proceeding, after a trial on the merits before the court without a jury. Dismissed.

W. H. Abel and *H. W. B. Hewen*, for petitioner.

W. W. Cotton, *Welsh & Welsh*, and *James G. Wilson*, for respondents.

PER CURIAM.—This suit was commenced in the superior court, by one boom company against another, for the purpose

¹Reported in 89 Pac. 479.

of condemning certain rights enjoyed by the latter company upon North river, in Pacific county. After a trial, judgment was entered on July 26, 1906, dismissing the petition. Application was then made to this court for a writ of review for the purpose of procuring the review of the cause here. The writ was issued on September 13, 1906, and directed that the record should be duly certified to this court on or before the 8th day of October, 1906; that each party should furnish printed briefs as in appealed cases, and that the cause should be assigned for hearing in this court in regular order with the appealed cases from Pacific county for the October, 1906, term. No return was made within the time specified in the writ. No application was made within that period for an extension of time within which to make return, and no showing was made within the time why the writ was not returned. Meantime the cause was assigned for hearing here on the 7th day of November, 1906. On the 2d day of November, the relator served upon the respondents a notice that it would apply on the 9th day of November, two days after the date set for hearing upon the merits, for an extension of time for certifying and returning the records and files of the superior court in the cause, and for the filing of a printed brief and statement of facts therein, until December 4, 1906. On account of this motion and notice, the respondents did not appear on November 7, the date the cause was assigned for hearing, but did appear on November 9, in response to the said motion and notice. When the cause was called on November 7, it was simply continued over the term, but no order was made extending the time for returning the record. The record was not returned on or before the 4th day of December, the time to which an extension was asked, and no return was made until the 20th day of December. Thus a second default in the making of the return occurred, even if the motion for extension of time had been granted. On the above facts, together with

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other matters of delay, the respondents have moved to dismiss the writ of review.

It will be observed that no return was made to the writ for more than two months after the time fixed by the return. No application for an extension of the time was made here until nearly one month after the time had expired. No action appears to have been taken by the court either by way of granting or refusing that application for an extension, but relator permitted it to drift until sixteen days after the time to which the extension was asked and then caused a return to be filed. If an order of extension had been made in accordance with the prayer of the motion therefor, there was, in any event, a default of sixteen days in making a return; but as no actual extension was made, the delay was much greater. There was at all events a period of sixteen days' delay for which no extension was even asked of this court. In the interest of an orderly and well-regulated procedure in certiorari proceedings, we think, under such circumstances, this court should decline to proceed with the review. The statute, Bal. Code, § 5744 (P. C. § 1399), provides, that the writ shall specify a time and place for the return. When that time is fixed by the court, it becomes the law governing the case and should have as much force as the times fixed by statute for governing appeals, unless it is changed by the court. The statute certainly contemplates that a return shall be made on or before the date fixed in the writ. Bal. Code, § 5748 (P. C. § 1403), provides, that if the return is defective, the court may order a further return to be made, thus clearly indicating that any modification as to time must be under the order of the court. The return should therefore be made not later than the day on which the writ is returnable, or to which the court by its order may have extended the time. 4 Ency. Plead. & Prac. 213.

"A formal legal return is generally a prerequisite to the jurisdiction of the court to review the proceedings or determination below." 6 Cyc. 802.

The return being necessary to confer jurisdiction to review, and the statute directing that the court shall fix a time for the return, the court must therefore be permitted to say when its jurisdiction to review shall be acquired. A party should not arbitrarily or by dilatoriness be permitted to change the rule which has been established as the law of the case. Generally the record to be reviewed must be prepared at the instance of the party applying for the writ, and if for any cause the delay is not due to his neglect, he should apply in ample time with a proper showing for an extension of the time. The writ may be quashed for failure to prosecute it with due diligence. 6 Cyc. 814. We think such diligence was not shown in this case. With no return filed within any time fixed by the court or within any time even asked by the relator, we think the writ should be dismissed, and it is so ordered.

[No. 6564. Decided April 4, 1907.]

P. C. SHIPLEY, *Respondent*, v. PETER MCPHERSON, *Executor of the Estate of W. A. Threlkeld, Deceased, Appellant*.¹

APPEAL—NOTICE—TIME FOR TAKING. Where notice of appeal is not served within ninety days after the date of entry of judgment, the appeal will be dismissed.

Motion to dismiss an appeal from a judgment of the superior court for Ferry county, Huston, J., entered April 30, 1906, and application for a peremptory writ to require the signing and certifying of a proposed statement of facts. Appeal dismissed.

James T. Johnson and Peter McPherson, for appellant.

G. V. Alexander, for respondent.

¹Reported in 89 Pac. 408.

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PER CURIAM.—This case comes before this court on motion of respondent to dismiss the appeal and upon an application of appellant for a peremptory writ requiring the trial court to sign and certify a proposed statement of facts.

It appears that the notice of appeal was not served within ninety days from the entry of the judgment, order, and decree from which an appeal is sought to be taken. This being true, the motion to dismiss the appeal must be granted.

The appeal being dismissed, there could probably be no occasion for a statement of facts. The application for the writ is therefore denied.

[No. 6615. Decided April 4, 1907.]

C. W. PHILBY, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.¹

DEATH—RIGHT OF ACTION—HUSBAND AND WIFE—DAMAGES—FUNERAL EXPENSES. A husband can recover for his loss of time and funeral expenses resulting from the wrongful death of his wife, irrespective of statutes.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered March 23, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the death of plaintiff's wife. Affirmed.

B. S. Grosscup, A. G. Avery, and G. C. Israel, for appellants.

Troy & Falknor, for respondent.

CROW, J.—Action by C. W. Philby against the Northern Pacific Railway Company and the Black Hills & Northwestern Railway Company, corporations, to recover damages

¹Reported in 89 Pac. 468.

for loss of time and funeral expenses, rendered necessary by the negligent and wrongful acts of the defendants in causing the death of Lula Bland Philby, the plaintiff's wife. From a judgment in favor of the plaintiff, the defendants have appealed.

The sole question on this appeal is whether the respondent, a husband, can recover for loss of time and funeral expenses directly resulting from negligent acts of the appellants, which caused the death of his wife. The trial court, following *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705, held that the respondent was entitled to recover. The appellants contend that such holding was erroneous. They insist that in the *Johnson* case this court followed *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, by definitely holding that, under Bal. Code, § 4828 (P. C. § 256), a husband cannot maintain an action for damages resulting from the wrongful death of his wife; that the language in the *Johnson* case upon which the trial court based its decision was undoubtedly used by this court without consideration, and can be attributed to the fact that liability for funeral expenses was conceded by the respondent in its brief; that it would be an anomaly for us to hold a husband has no cause of action for the death of his wife, and at the same time permit him to recover damages growing out of her death; that the statute gives him no such right of action; that he could not sue at common law; citing *Baker v. Bolton*, 1 Campbell 493; that the only departure from the common law rule has been made by Lord Campbell's act, and similar statutes in this country; that such acts have only extended a right of action to certain specified beneficiaries; and that under § 4828, *supra*, the statute of this state, as repeatedly construed by this court, the husband of a deceased wife is not such a beneficiary. In brief, the appellants contend, (1) that the respondent has no right of action at common law; (2) that no right of action has been conferred upon him by any statute, naming him as a beneficiary, and (3) that hav-

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ing neither a common law nor a statutory right of action he cannot recover.

Statutes permitting a husband or any other beneficiary to recover damages for the wrongful death of a wife or relative are based upon the idea of giving compensation for loss of services, companionship, etc. In other words, they were intended to award compensation for a human life, giving damages of a character which, although real, were theretofore not the subject of judicial computation and could not be allowed or estimated by any exact rule of mathematical calculation. In such statutory actions the exact damages to beneficiaries cannot be accurately proven, but juries, after being advised of all the material facts and circumstances, such as the health, habits, age, expectancy of life, capacity to earn money, habits of economy, etc., of the decedent, are called upon to award such damages as in the exercise of their judgment they conclude will be a just compensation. Such damages in their very nature differ materially from the pecuniary loss for funeral expenses and loss of time sustained by a husband, whose wife is killed by the wrongful or negligent act of another. The wife's death imposes upon the husband the financial burden of funeral expenses which he must pay. At common law he was bound to bury his deceased wife in a suitable manner, and defray the necessary expenses thereof if he possessed the means. 13 Cyc. 273. Such expenses can be exactly estimated, and while in one sense they may have ensued from the death of the wife, they are more strictly speaking a financial loss resulting directly from the negligent acts of another.

Although the appellants have cited an English case, *Baker v. Bolton*, *supra*, to show that: "In a civil court the death of a human being could not be complained of as an injury," they have failed to cite, and we are unable to find, any authorities going so far as to hold that, in the absence of express statutory provision therefor, a claim for funeral expenses such as the one presented in this action cannot be

recovered. In *Dalton v. The South-Eastern R. Co.*, 4 C. B. (N. S.) 296, the plaintiffs, husband and wife, were permitted to recover for the wrongful death of their son, who, although above the age of majority, had contributed to their support, the action being founded on Lord Campbell's act. The jury, with other items of damages, allowed ten pounds for funeral expenses and fifteen pounds for mourning. These and other items were resisted by the defendant, and the court in rendering judgment said:

"As to the expenses of the funeral and mourning, however, we think they ought not to be allowed. The subject-matter of the statute, is, compensation for injury by reason of the relative not being alive: and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss."

According to this theory Lord Campbell's act would not permit any recovery for funeral expenses. Some of the American courts, however, have permitted such a recovery. See 13 Cyc. 374, and cases cited in note 29. In *Murphy v. New York Central etc. R. Co.*, 88 N. Y. 445, such an act was construed, and the court not only held that funeral expenses could be recovered, but also recognized them to be an item of pecuniary damages which only one of the plaintiffs was obliged to pay, and which were different from the ordinary damages allowed by reason of the statute. See, also, *Houghkirk v. President etc.*, 92 N. Y. 219, 44 Am. Rep. 370; *Roeder v. Ormsby*, 22 How. Pr. 270.

The appellants, in support of their contention that the respondent cannot recover, vigorously urge the construction placed upon the word "heirs" in § 4828, *supra*, in the following cases: *Noble v. Seattle*, *supra*; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore etc. R. Co.*, 26 Wash. 484, 67 Pac. 274; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582; *Manning v. Tacoma R. & Power Co.*, 34 Wash. 406, 75 Pac. 994; *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705.

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In *Manning v. Tacoma R. & Power Co.*, *supra*, although adhering to the rule previously announced in *Noble v. Seattle*, *supra*, we said:

"We think it proper to say that, as this court is now constituted, if the question were now here as one of original statutory construction, it is not improbable that a different construction would be adopted."

While still adhering to the construction heretofore placed on this statute, we do not feel inclined to extend the same, and therefore decline at this time to announce the rule that the respondent cannot recover in this action for his loss of time and his disbursement for funeral expenses, which as damages resulted directly from the wrongful acts of the appellants.

In the early English case of *Higgins v. Butcher*, Yelverton Reports, 89, the plaintiff declared that "the defendant assaulted and beat, etc., A., his wife such a day, from which she died such a day following; to his damage," etc. Tanfield, Justice, speaking for the court, said:

"If a man beats the servant of F. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offense to the Crown, being converted into felony, and that drowns the particular offense, and private wrong offered to the master before, and his action is thereby lost."

This opinion was rendered in 1607, and no kindred English case seems to have been reported until 1806, when Lord Ellenborough held, in *Baker v. Bolton*, *supra*, cited by appellants, that in a civil court the death of a human being could not be complained of as an injury. In *Worley v. Cincinnati etc. R. Co.*, 1 Handy (Ohio) 481, a husband sued to recover damages resulting from the wrongful death of his wife, asking \$5,000 for the loss of her services, and also stating that he had expended a considerable sum for funeral charges. The

question involved was his right to recover these damages independent of statute. Mr. Justice Storer, in a very able opinion, reviews the authorities, and, discussing *Higgins v. Butcher*, *supra*, said:

"The reasoning in *Yelverton* we could not adopt, as it is inapplicable to our judicial proceedings. We have no felonies as at common law or by the British statutes; the commission of crime here works no corruption of blood, or attainder of estate; the individual doing the wrong, though punishable to the extremity of the law, is still liable for the personal injury he inflicts, and his estate may be legally subjected, by way of indemnity, to the injured party."

Referring to the later case of *Baker v. Bolton*, *supra*, the learned justice further said:

"The ground of Lord Ellenborough's opinion is more in consonance with our jurisprudence, and gives a broader rule for the decision of the question. It was confined, however, to a single point, and did not present, so fully as might have been expected from so profound a jurist, the whole argument; but we may well suppose, that where no precedent could be found for the action, a simple negation of the right to recover was all that he deemed it necessary judicially to affirm. When it is said that the death of a human being can not be made the subject of damages in a civil action, we must infer that to allow the remedy in such a case would be inconsistent with the policy of the law that will not permit the value of human life to become the subject of judicial computation."

The value of Mrs. Philby's life has not become the subject of judicial computation in this action. The respondent only seeks to recover money actually disbursed by him for funeral expenses, and the value of his own lost time. In the *Worley* case two items of damages were pleaded, (1) the husband's loss of the services of his wife in the care of his children and the management of his household affairs, and (2) the sum expended for funeral charges. Mr. Justice Storer, after discussing the English cases above mentioned, and also several early American cases, calls attention to the fact that the

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action was not brought under the Ohio statute, and speaking of that statute said:

"The second section distributes the damages recovered between the widows and the next of kin, which presupposes that the wife is deprived of her husband, and very strongly indicates that it was not the intention of the legislature to extend the remedy to him should he survive the wife; and such is the construction, we believe, that is given to the statute of New York on the same subject."

The learned jurist closes his opinion by saying:

"We can find no authority, and we are satisfied there is no sound reason, on general principles, to authorize a recovery by the plaintiff. On the whole case, we hold, there is no claim in the petition that can be legally supported, except for the expenditures actually made in consequence of the wife's death; and for these, as the husband would have been liable, he has the right to recover; as to all the remaining claim for damages, the demurrer must be sustained."

We adopt the conclusion reached in this exhaustive opinion, based upon the theory that a clear distinction exists between damages resulting to a husband from the death of his wife in the loss of her services and companionship, and pecuniary damages resulting to him, such as funeral expenses and loss of time. We hold that, while under our statutes and the previous decisions of this court, he cannot recover the former, he is nevertheless entitled to recover the latter, regardless of any statute. This doctrine is in harmony with the rule announced in *Johnson v. Seattle Electric Company*, upon which the respondent relies, and which the appellants have sought to distinguish. It also harmonizes with *Dean v. Oregon R. & Nav. Co.*, 44 Wash. 564, 87 Pac. 824, where we said:

"It is urged that respondent was not entitled to recover expenses for transporting the body of decedent to respondent's home in Arkansas. The total amount for this and burial expenses was \$178. We think this a moderate sum to ask. It was the duty of respondent to bury the body of his minor son, and it was but natural and fitting that the remains should

be taken back to the old home. Appellant being responsible for decedent's death, it is holden to pay the reasonable cost of burial and the expenses appropriately incidental thereto. In view of these considerations and the small sum expended and sought to be recovered, we think the allowance justifiable."

The learned trial judge committed no error in permitting the jury to award the damages in question. The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 6624. Decided April 4, 1907.]

BREHM LUMBER COMPANY, *Respondent*, v. C. B. NIBLOCK, *Appellant*.¹

JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED—DETERMINATION—EVIDENCE. In an action between joint builders of a spur track to recover a balance due from one to the other on account of expenditures, a general verdict in favor of the plaintiff for \$2,800 cannot be shown by a computation to conclusively establish the fact that the cost of construction was \$10,943.56, so as to estop a party from claiming in a subsequent action that the cost was \$12,836.75, where there was no special finding in the previous suit, and it appears that a counterclaim was interposed for an independent matter, which the jury might have allowed under the evidence, and where in the previous action the cost of construction was shown by the written statement of one party to be \$12,836.75, and by the admission of the other party to be \$12,253.30, and was admitted in the pleadings of the subsequent action to be \$11,313.16.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 2, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Peters & Powell, for appellant.

Brownell & Coleman, for respondent.

¹Reported in 89 Pac. 1134.

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Opinion Per Crow, J.

Crow, J.—On August 5, 1901, the defendant, C. B. Niblock, entered into a written agreement with the Northern Pacific Railway Company, for the building of a spur from one of its branch lines to a mine owned by defendant, in section 1, township 24, north, of range 7, east, W. M. The defendant was to furnish right of way, grade, and ties, and pay for the labor of laying and surfacing the track. The railway company was to furnish the labor for which the defendant was to pay, and was also to furnish rails, angle bars, bolts, spikes, and switch materials at its expense. It was also to allow the defendant a rental of \$1.50 per loaded car for all shipments to and from the spur until such rentals should fully equal the total amount paid by the defendant for track labor, surfacing, etc. The plaintiff corporation, Brehm Lumber Company, being the owner of the timber on section 36, in township 21, north, of range 3, east, land belonging to defendant, having the right to remove such timber, and desiring to jointly use the spur, entered into a written contract with defendant Niblock providing, that they should jointly build the spur and equally divide the expense; that if either should fail to join in construction, the other might do the work and charge one-half of the cost to the defaulting party, who should pay the same upon demand; that when the timber was removed from section 36, and the Brehm Lumber Company should have surrendered the land to Niblock, he—Niblock—should thereafter have the exclusive use of the spur; that if, at the time of such removal of the timber and surrender of the land, the car rental then received from the railway company had not been sufficient to defray the entire cost of construction, Niblock should pay the Brehm Company one-half of the difference between the cost of construction and the amount of the rentals then received. From this statement it will be seen (1) that, in the first instance, one-half of the original cost of construction was to be paid by each party, (2) that the car rental was to be applied on the cost of construction, and (3) that when the Brehm Company

had removed the timber and surrendered possession of section 36, Niblock should pay the Brehm Company such portion of the remaining one-half of the cost of construction as had not been satisfied by the car rentals.

The spur was built by the plaintiff Brehm Company at its expense, the defendant from time to time making partial but not full payments of its one-half therefor. When the spur was completed, the Brehm Company demanded from Niblock the unpaid portion of his one-half of the cost, and instituted suit to recover the same, together with one-half of the car rentals then received by Niblock. In that action the Brehm Company, after a jury trial, recovered a judgment for \$2,800, which was paid. Afterwards the plaintiff, claiming that it had completely removed the timber and had surrendered section 36 to the defendant, brought this second action to recover the sum then remaining due on the original cost of construction. In its complaint it alleged such original cost to be \$12,836.75; that the defendant Niblock had paid \$7,397.53 thereon, and demanded judgment for \$5,439.22. The defendant by his answer alleged that the original cost of construction was only \$11,313.16; that such fact had been adjudicated on the trial of the former action; that the plaintiff should be estopped from denying the same; that the defendant was entitled to a counterclaim of \$364.50, treble damages for a trespass committed by the Brehm Company in entering defendant's land and removing timber of the value of \$121.50; and that defendant had paid taxes for 1904, amounting to \$68.13, for one-half of which the plaintiff was liable. The trial court made findings in favor of the plaintiff. From a judgment for \$4,566.55, entered thereon, the defendant has appealed.

The appellant contends that the trial court erred (1) in not finding that the total cost of construction was conclusively determined in the previous suit to be \$10,943.56; (2) in failing to find that the appellant was entitled to its counterclaim for trespass; (3) in failing to allow appellant one-half

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of the taxes for 1904; and (4) in finding the respondent entitled to any greater sum than \$3,390.47. The principal contention is, whether in the first action the jury actually determined the entire cost of construction to have been \$12,836.75, as alleged by the respondent, instead of \$11,313.16, as alleged by appellant, or \$10,943.56 as now contended in his brief. It was agreed at the trial of the first action that the appellant had theretofore paid the Brehm Company \$4,597.53 on account; that appellant had then received car rentals from the Railway Company to the amount of \$3,635.50; that the respondent was entitled to \$1,817.75, one-half thereof, and that the appellant had paid \$216 taxes, for one-half of which respondent was liable.

The appellant, in explaining how the jury arrived at its verdict of \$2,800 in the first action, now presents a tabulated statement showing the various items which he insists they considered and allowed, and by calculation concludes that they must have fixed the original cost of construction at \$10,943.56. This method of ascertaining the facts found by the jury, while very ingenious, is not convincing. Appellant's system of analysis ignores several important factors; for instance, in the first action he presented a counterclaim of \$750, for one-half of the profits earned by respondent in running a boarding house, and introduced evidence to support the same. The question as to whether it was sustained was submitted to the jury under proper instructions. A general verdict for \$2,800 was returned. No special finding as to any one item was made. Evidence which would have warranted the allowance of this boarding-house item was admitted, and submitted to the jury for their consideration, while evidence which would have sustained them in rejecting it either in whole or in part was also admitted. In the absence of special findings it is impossible to determine how the jury arrived at their general verdict for \$2,800. The verdict shows that it included interest to date of trial. Appellant makes no allusion to this item in his analysis. All evidence

offered on the first trial was by agreement admitted on the trial of this action, and it shows that the respondent and the appellant jointly presented to the Railway Company a written statement prepared by respondent, showing the original cost of construction to have been \$12,836.75. Moreover on the first trial the appellant Niblock admitted the cost of construction to have been \$12,253.30. By his answer in this case he admits \$11,313.16. It would be unreasonable to now assume that the jury on the first trial found the cost of construction to be only \$10,943.50. The record fails to show that the verdict of the jury and the judgment in the first action so definitely adjudicate or ascertain the cost of construction as to estop the respondent from showing the same in this action. Without further discussion, we will state that, after a careful examination of the record, we conclude the findings made by the trial court were sustained by the preponderance of the evidence and support the final judgment entered.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per Root, J.

[No. 6287. Decided April 4, 1907.]

GRIGGS LAND COMPANY, *Appellant*, v. J. G. SMITH, *as Administrator of the Estate of John Bruster, Deceased, et al., Respondents*.¹

EXECUTORS AND ADMINISTRATORS—LAND UNDER CONTRACT OF SALE—PROCEEDINGS — PARTIES — STATUTES — IMPLIED REPEAL. Bal. Code, §§ 6381 *et seq.*, providing that the probate court may authorize an administrator to convey lands which the decedent had contracted to convey, is not impliedly repealed by Bal. Code, § 4640 *et seq.*, providing that upon the death of a person, the lands of which he died seized shall immediately vest in the heirs; since repeals by implication are not favored, and lands held by the deceased under contract to convey may be treated as personalty; hence upon proceedings by the purchaser for specific performance against the administrator, under the statute, the heirs are not necessary parties defendant.

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered January 30, 1906, upon sustaining a demurrer to the complaint, dismissing an action for the partition of real property. Reversed.

Douglas, Lane & Douglas, for appellant.

W. J. Canton and Arthur McGuire, for respondents.

Root, J.—In his lifetime one John Bruster entered into a contract to convey an undivided half interest in certain land to one Bruce A. Griggs. The contract was duly recorded. Subsequently Bruster conveyed portions of the remaining half interest in said land to other parties. Thereafter Bruster died and respondent Smith was appointed his administrator by the superior court of Okanogan county, and duly qualified. Under Bal. Code, §§ 6381-6391 (P. C. §§ 1292-1302), said Griggs filed his petition for the specific performance of decedent's contract with him; and such proceedings were had, in accordance with said statutes, that specific performance

¹Reported in 89 Pac. 477.

was decreed. No appeal having been taken, the administrator executed a deed of said undivided one-half interest to Griggs. The latter and wife thereafter conveyed their interest to appellant, who brought this suit in partition. The amended complaint sets up the foregoing facts and the necessary formal matters to present the case to the court. A demurrer to said amended complaint was sustained. Appellant elected to stand upon its amended complaint, whereupon a judgment of dismissal was entered, from which this appeal is taken.

The only question presented upon appeal is this: Did the enactment of § 4640 *et seq.*, Bal. Code, (P. C. § 2718), repeal § 6381 *et seq.* (P. C. § 1292)? Section 6381, *supra*, reads as follows:

“If any person, who is bound by contract, in writing, to convey any real property, shall die before making the conveyance, the superior court of the county in which such real estate or any portion thereof is situate may make a decree authorizing and directing his executor or administrator to convey such real property to the person entitled thereto.”

The sections following this set forth the procedure necessary to secure a decree for, and a deed of, conveyance. Section 4640, enacted in 1895, reads as follows:

“When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: *Provided*, That no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any

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such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under such executor or administrator; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or administrator and those lawfully claiming under such executor or administrator."

Respondents urge, and the trial court held, that the last-quoted section, interpreted in the light of *Anrud v. Scandinavian American Bank*, 27 Wash. 16, 67 Pac. 364, and *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765, had the effect of repealing § 6381 *et seq.*, and that the decree of the court and the deed made in pursuance thereof were invalid and of no effect inasmuch as the heirs of the decedent Bruster were not made parties to the proceeding. Appellant contends that § 4640 *et seq.* are not inconsistent with § 6381 *et seq.*, and that the latter were not repealed. It invokes the doctrine of equitable conversion, and cites, among other authorities, Story's *Equity Jurisprudence* (13th ed.), 790 and 1212, where Mr. Justice Story, among other things, says:

"There is another consideration which is incident to this subject and to which courts of equity have given an attention and effect proportioned to its importance. In the view of courts of law, contracts respecting lands or other things of which a specific execution will be decreed in equity are considered as simple executory agreements, and as not attaching to the property in any manner as an incident, or as a present or future charge, but courts of equity regard them in a very different light. They treat them for most purposes precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land even before the conveyance is made, and it passes by descent to his heir as land. The vendor is deemed in equity to stand seized of it for the benefit of the purchaser,

and the trust (as has already been stated) attaches to the land so as to bind the heir of the vendor and everyone claiming under him as a purchaser with notice of the trust. The heir of the purchaser may come into equity and insist upon a specific performance of the contract; and unless some other circumstances affect the case he may require the purchase money to be paid out of the personal estate of the purchaser in the hands of his personal representative. On the other hand the vendor may come into equity for a specific performance of the contract on the other side and to have the money paid; for the remedy in cases of specific performance is mutual, and the purchase money is treated as the personal estate of the vendor and goes as such to his personal representatives.

"Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered as transferable, transmissible, and descendible, according to its new character as it arises out of the contracts or other acts and intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity that where things are agreed to be done they are to be treated for many purposes as if they were actually done. Thus . . . where a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand the money is treated as the personal estate of the vendor and as subject to the like modes of disposition by him as other personalty, and is distributable in the same manner on his death."

We think appellant's contention must be upheld. Repeals by implication are not favored. There is nothing in the Law of 1895 (Bal. Code, § 4640 *et seq.*) which indicates any intention to repeal the provisions of § 6381 *et seq.* The latter were statutes dealing with contracts for conveyance of real estate after the grantor's decease. The statute of 1895, general in its character, provided for the descent

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of the title to real estate immediately to the heirs. It was admitted that an administrator would have power to sell the property to pay debts of the estate incurred by the decedent in his lifetime. The contract that he made to convey this property was an obligation which he left unfilled at the time of his death. There would seem to be no good reason why the administrator, whose province it is to settle up the affairs of the estate, should not adjust this matter. Section 6381 provides that he should so do. The purpose of § 4640, to vest title to real estate in the heirs immediately upon the death of the ancestor, should not be held to contravene the objects of § 6381 *et seq.* The case of *Anrud v. Scandinavian American Bank*, *supra*, involved a mortgage foreclosure instituted after the death of the mortgagor. In this state a mortgage upon real estate is but a lien, the title to the mortgaged property remaining in the mortgagor, and, of course, descending immediately to the heirs upon his death under § 4640. But in the case at bar, the owner of the land had made a contract to convey and he could leave to his heirs only the interest then owned, which was virtually but the right to the proceeds—the holder of the contract being entitled to have the land conveyed to him upon paying the purchase price. In such cases the courts have treated the property, for purposes of administration, as personal rather than real. A recognition of this doctrine may be found in *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249. As bearing upon propositions herein suggested, see, also: *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451; 26 Am. & Eng. Ency. Law (2d ed.), 721 to 726; 9 Cyc. 826; and 7 Am. & Eng. Ency. Law (2d ed.), p. 471.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to overrule the demurrer, and to proceed in accordance with this opinion.

HADLEY, C. J., FULLERTON, RUDKIN, DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 6504. Decided April 6, 1907.]

FRYE & BRUHN. *Respondent*, v. J. E. PHILLIPS, *Defendant*,
V. G. OLIVER, *Appellant*.¹

PARTNERSHIP—RELEASE OF RETIRING PARTNER—NOVATION. A novation is effected where, in consideration of part payment by a retiring partner and the promise of the continuing partner to pay the balance of the debt, the creditor agrees to release the retiring partner.

TRIAL—WAIVER—DEFENSE. A motion by plaintiff for judgment at the close of defendant's case does not waive plaintiff's right to contest the affirmative matter set up in the answer.

APPEAL—DECISION—NEW TRIAL. Upon reversing a judgment for plaintiff, entered on a challenge to the sufficiency of the defendants' evidence to sustain their affirmative defense, a new trial should be awarded.

Appeal from a judgment of the superior court for Kitsap county, Frater, J., entered June 6, 1906, in favor of the plaintiff, upon a challenge to the sufficiency of the evidence to sustain defendants' affirmative defense, upon a trial before the court without a jury, in an action to recover upon a partnership indebtedness. Reversed.

B. B. Crawford, for appellant.

Piles, Howe & Farrell and *Dallas V. Halverstadt*, for respondent.

PER CURIAM.—The defendant Phillips and the appellant Oliver were partners conducting a restaurant business. As such partners they contracted an indebtedness for meats, to the respondent, on which there was due August 19, 1905, the sum of \$330.14. On that day Mrs. Oliver sold her interests in the business to Phillips and retired from the partnership. Later in the day she went to the manager of the respondent, stated that she had sold her interests in the restaurant to Mr. Phillips, and that she desired to pay half of the partner-

¹Reported in 89 Pac. 559; 93 Pac. 668.

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ship indebtedness and be released therefrom. The manager told her that that would be satisfactory. She thereupon paid a part of the account, and later another part, in all \$85. The manager then told her that she owed nothing more, as Mr. Phillips had taken up the account, and the company would look to him for it. Phillips did not pay the balance, and this action was begun against both partners to recover the amount. Phillips defaulted, and Mrs. Oliver pleaded the agreement above set out as an accord and satisfaction. The action was tried before the court without a jury, and resulted in a judgment for the respondent; the court holding that the agreement was without consideration.

The appellant and respondent have discussed at some length the question whether, under the laws of this state, a payment of a part of a debt under an agreement to release the whole operates as a release of the whole debt, but we have found it unnecessary to discuss this question, as it seems to us the case is governed by another principle. The evidence clearly shows a novation. The creditor agreed, in consideration of the payment of a part of the debt by the retiring partner and the promise of the continuing partner to pay the debt, to release the retiring partner. Under the great weight of authority, this effects a substitution of debtors and operates to release the retiring partner. *Scott v. Hallock*, 16 Wash. 439, 47 Pac. 968; *Bates*, *The Law of Partnership*, § 505; 22 Am. & Eng. Ency. Law (2d ed.), p. 182, 183.

The court was therefore in error in holding the appellant liable. The judgment is reversed, and the case remanded with instructions to enter judgment for the appellant.

ON PETITION FOR REHEARING.

[Decided February 8, 1908]

PER CURIAM.—Inasmuch as the original indebtedness was admitted, the burden of proof rested upon the answering defendant to establish the allegations of her affirmative de-

fense. At the close of her testimony the court ruled that the agreement set forth in the answer was without consideration, and granted judgment in favor of the plaintiff for the full amount claimed. In the original opinion filed in this case we held that the agreement set forth in the answer was founded upon an adequate consideration, and reversed the judgment, with directions to enter judgment in favor of the defendant. The plaintiff did not waive its right to contest the affirmative matter set forth in the answer by moving for judgment at the close of the defendant's testimony, any more than a defendant waives his right to contest the plaintiff's case by moving for a nonsuit. For this reason a new trial should have been awarded instead of directing judgment for the defendant. To this extent the original opinion is modified, but in all other respects the petition for rehearing is denied.

[No. 6476. Decided April 6, 1907.]

S. S. MORITZ, *Appellant*, v. SAMUEL HERSKOVITZ,
Respondent.¹

CONTRACTS—SALES—CONSTRUCTION—QUESTION FOR JURY. Where the meaning of a clause in a contract to sell goods at "sixty-five cents on the dollar" is uncertain, and evidence is offered by both parties to explain it, the construction of the same is a question for the jury and not one of law for the court.

EVIDENCE—DECLARATIONS—RES GESTAE. Upon a dispute as to the construction of a contract, a letter from the appellant's attorney to the respondent, setting out appellant's version of the transaction, is inadmissible as a self-serving declaration, is no part of the *res gestae*, and is immaterial as notice.

CUSTOMS AND USAGE—SALES—EVIDENCE—ADMISSIBILITY. Upon a sale of merchandise at D. for a certain per cent of their cost, it is not error to exclude evidence of a particular custom at D. to add

¹Reported in 89 Pac. 560.

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freight charges to the cost, where it was not shown that the vendee knew of the custom, and evidence was received of the general custom throughout the state which did not differ from the custom at D.

SALES—BREACH OF CONTRACT—DAMAGES—MITIGATION—EVIDENCE. In an action to recover the price of goods sold, evidence of the amount of insurance received by the vendor for a loss by fire while the goods were in his possession, is admissible in mitigation of the damages.

COSTS—TAXATION—APPEAL—WAIVER OF OBJECTIONS. Error cannot be predicated on the taxation of costs, where the motion to retax was not filed until three months after the taxation.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered August 4, 1905, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

M. M. Godman and Samuel R. Stern, for appellant.

Robertson & Rosenhaupt, for respondent.

PER CURIAM.—On June 19, 1902, the appellant owned a stock of merchandise then in his store at Dayton, Washington, and on that day agreed in writing to sell the same to the respondent for the consideration, as expressed in the writing, of "sixty-five cents on the dollar." Shortly thereafter, preparatory to completing the sale, the parties proceeded to take an inventory of the stock, during the course of which, owing to the different construction each placed upon the writing, difficulties arose between them which finally resulted in the abandonment of the transaction by the respondent and his refusal to have anything further to do with it. The appellant thereupon treated the goods as the respondent's, sold them at private sale and at auction as he best could, and after having disposed of them, brought this action against the respondent to recover the difference between the amount he received for them and what he conceived to be the contract price. The case was tried twice to

a jury, resulting in a verdict for the respondent at each trial. The first verdict was set aside by the court because of certain instructions given the jury which the judge afterwards conceived to be erroneous; judgment was entered on the second verdict, and this appeal is taken therefrom.

At the trial there was much evidence introduced explanatory of the meaning of the phrase, "sixty-five cents on the dollar," used in the contract, the principal dispute between the parties being over the question whether it was meant to include 65 per centum of the invoice price of the goods, or 65 per centum of the invoice price plus the cost of transporting them from the place where they were purchased to Dayton. The court instructed the jury that the question was one for them to determine from a consideration of the evidence, and this instruction constitutes the first error assigned. The appellant insists that the question was one of law to be determined by the court, and that the court should have instructed the jury whether or not the phrase meant 65 cents on the dollar with or without freight added. But we think the court correctly instructed the jury on the question. As used in this contract, the meaning of the phrase was uncertain, and evidence was properly introduced by both sides to explain its meaning. This evidence was contradictory. If the appellant's version was correct then it meant one thing; if the defendant's, then it meant another. Under these circumstances the court could do nothing else than present to the jury the two theories, and allow them to say which was the correct construction.

After the respondent had refused to deal further with the appellant, the appellant put the matter into the hands of his counsel, who wrote a letter to the respondent setting out the appellant's version of the transaction. This letter was offered in evidence by the appellant and rejected by the court. The appellant now insists that it was admissible as part of the *res gestae*, or if not that, at least as notice of the disposition the appellant intended making of the goods. But

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plainly the letter was inadmissible. It was but a self-serving declaration, no part of the *res gestae*, and immaterial as notice.

The court refused to allow the appellant to show what the particular custom was at Dayton, Washington, as to adding the freight charges to the cost of merchandise, but allowed him to show that such was the general custom throughout the state. Error is assigned on the refusal to permit him to show the particular custom. The point is not well taken. There was no evidence tending to show that the respondent was acquainted with the particular custom at Dayton, or that he purchased the appellant's stock with reference thereto, nor was it claimed that the custom at Dayton differed from the general custom. The evidence was not admissible.

While the appellant was selling the goods, a fire occurred in a neighboring store damaging the goods to a considerable extent, and for which the appellant had collected insurance. On cross-examination he was questioned concerning the loss, the amount of insurance collected, and the disposition he had made of the money. This is assigned as error, but it was permissible as tending to reduce the amount of the damages the appellant was entitled to recover if he recovered at all.

Finally it is objected that the cost bill is excessive in that a witness was allowed mileage for a distance of more than 20 miles from the place of trial. The objection to this item, however, came too late, as the motion to retax was not filed until some three months after the costs had been taxed.

There is no error in the record and the judgment will stand affirmed.

[No. 6499. Decided April 6, 1907.]

M. G. SOLBERG, *Appellant*, v. EDWARD A. BALDWIN *et al.*,
Respondents.¹

TAXATION—FORECLOSURE—DEFENSES. LAWS 1899, p. 299, § 18, providing that if, in a tax foreclosure, a defense in writing specify a particular "cause of objection," the court shall hear the same in a summary manner without other pleadings, does not restrict defenses to matters pertaining to the levy and assessment of the tax, or preclude the overruling of a demurrer to a cross-complaint.

SAME—DEFENSES—PAYMENT—FRAUD—ANSWER—SUFFICIENCY. An answer denominated a cross-complaint, in a tax foreclosure, is in reality a "statement of new matter constituting a defense," viz., a plea of payment, where it alleges a fraudulent payment of the taxes by one while in possession and receiving rents and profits, who took out a certificate of delinquency in the name of others for the purpose of defrauding creditors of the owners; and under such circumstances a court of equity will not decree a sale of the land for the taxes so paid.

SAME—PAYMENT. Payment of taxes can be pleaded to defeat a tax foreclosure, even as against the state.

SAME—TENDER. A tender of a tax is not essential to a defense to a tax foreclosure, where the plea is that the taxes were paid by one in possession having money rightfully applicable thereto, and that the tax title was fraudulently taken in the name of another who was but a dummy for the payor of the taxes.

SAME—FRAUD—PAYMENT TO STRENGTHEN TITLE. One paying taxes for the purpose of defrauding creditors of the owner of the land does not stand in the position of one who acquires a tax title for the purpose of strengthening his own title, and can acquire no rights by such payment.

Appeal from a judgment of the superior court for Clallam county, Hatch., J., entered June 5, 1906, in favor of the answering defendant, upon overruling a demurrer to the cross-complaint, in an action to foreclose a tax lien. Affirmed.

James Stewart and Brownell & Coleman, for appellant.
Trumbull & Trumbull, for respondents.

¹Reported in 89 Pac. 561.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The appellant brought this action to foreclose a certificate of delinquency issued for delinquent taxes assessed upon certain real property in the county of Clallam. The complaint in foreclosure was in the statutory form, and contained the usual notice to the effect that application would be made to the superior court of Clallam county on a date named for a judgment foreclosing the lien of the certificate. Of the several parties defendant, all defaulted except R. K. Brown and wife, who answered by general denials, and by a statement of new matter in the form of a cross-complaint. In the cross-complaint, after the formal allegations, it was alleged that on and prior to July 18, 1899, the defendant Union Savings and Loan Association was the owner of the property covered by the certificate of delinquency, and on that date conveyed the same to the defendant Edward A. Baldwin, without any consideration, and as a result of conspiracy entered into between the officers of the defendant association to defraud the corporation's creditors and obtain its property for the benefit of its officers, of whom the defendant Baldwin was one. That at the time of the conveyance mentioned, the answering defendant was a creditor of the association, and shortly thereafter obtained a judgment against it for some \$2,500; that an execution was issued thereon and the property sold to him, said sale taking place in December, 1902. That prior to the sale last mentioned, Baldwin and wife had conveyed the property without consideration to the defendant the Co-operative Investment Company, that sale also being a part of the scheme to cheat and defraud the creditors of the Savings Association. That after purchasing the property at his own execution sale, the respondent Brown began an action against the Co-operative Investment Company and the other conspirators, to set aside the conveyances from the Savings Association to Baldwin and from Baldwin to the Co-operative Investment Company, against which Baldwin and the Co-operative Investment Company alone defended, the other defendants therein making de-

fault; that a trial was had after issue joined, which resulted in a finding and decree to the effect that the conveyances to Baldwin and the Co-operative Investment Company were fraudulent and void, and that this defendant had acquired title to the property by virtue of his judgment and the sale thereunder.

It is further alleged in the cross-complaint that Baldwin and other officers of the Savings Association organized, in 1900, under the laws of Oregon, another corporation known as the Tax Title Company, the same being organized to better carry out the conspiracy to absorb the property of the Savings Association; that this corporation had no assets or business, and was used by Baldwin as a means of concealing his identity, and disguising his transactions; that in pursuance of the conspiracy to defraud the creditors of the Savings Association, Baldwin paid the taxes on the property in question here on March 23, 1902, for the years 1897 to 1900 inclusive, but instead of taking a receipt therefor, he represented that the payment was made by the Tax Title Company and procured the treasurer of Clallam county to issue a certificate of delinquency therefor to the Tax Title Company; that the Tax Title Company never had possession of the certificate, but the same was retained by Baldwin; that Baldwin paid the taxes on the land for the years 1901, 1902, 1903, and 1904, as the same became due, but took a receipt for the year 1901 only in his own name (the receipt for the year 1902 being taken in the name of the Tax Title Company, that for the year 1903 in the name of the Co-operative Investment Company, and that for the year 1904 in the name of the appellant M. G. Solberg); that all of said taxes were paid while the lands were in the possession of Baldwin and his tenants, who were collecting the rents and revenues of the same; the 15th and 16th paragraphs of the cross-complaint being as follows:

"That on or about the 1st day of May, 1905, the said Baldwin knew that the said suit numbered 1939 to vacate and

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set aside said fraudulent conveyances would be tried in a short time, and for the purpose of anticipating an adverse decision in said cause, and to embarrass the plaintiff in said cause, caused this proceeding to be instituted to foreclose said pretended delinquency tax certificate number 338, and to that end fraudulently conspired with the plaintiff herein, G. M. Solberg, to have her pretend and allege to be the owner and holder of said certificate and that she had paid the subsequent taxes, when in truth and in fact she is not the owner or holder of said certificate and never paid any consideration therefor and has not paid the subsequent taxes and has no interest whatever in said certificate or said taxes or in this proceeding to foreclose said certificate of delinquency, and is acting solely as a dummy in this proceeding for the said E. A. Baldwin and wife to aid them to hold and retain the said property, and if they failed in that, to aid them in retaining the benefit of the rents and profits of said property and at the same time compel the said R. K. Brown and wife to reimburse them for the taxes paid by them while in possession of said premises, besides large accumulations of interest at the rate of fifteen per cent.

"That the said E. A. Baldwin and wife and the Co-operative Investment Company are nonresidents of the state of Washington and have no property therein, and if the said R. K. Brown and wife are compelled to pay said taxes and interest they will have no remedy against the said Baldwin and wife and the Co-operative Investment Co. to recover the rents and profits and thereby recoup themselves for said taxes."

The prayer was that the plaintiff take nothing by the proceeding, and for costs.

To the cross-complaint the appellant Solberg demurred on the grounds, (1) that the court had no jurisdiction of the subject-matter of the action set out in the cross-complaint, and (2) that the cross-complaint did not state facts sufficient to entitle the cross-complainants to the relief demanded, or to any relief. The demurrer was overruled by the court, whereupon the appellant elected to stand thereon and refused to plead further. Judgment was thereupon en-

tered in favor of the defendant Brown according to the prayer of his cross-complaint. Solberg alone appeals.

Of the errors assigned for reversal, the first proper to be noticed is the contention that cross-complaints are inhibited by the statute providing for the foreclosure of certificates of delinquency. The statute provides that the court shall examine each application for foreclosure, and if a defense in writing specifying the particular cause of objection be offered by any person interested in the foreclosure, the court shall hear and determine the matter in a summary manner, and without other pleadings. Laws 1899, p. 299, § 18. The appellant argues that under this statute it was plainly the duty of the court to sustain the demurrer to the new matter set out in the respondents' answer, because it is evident that the only matter that can be a cause of objection to a tax foreclosure is something pertaining to the tax itself, and the cross-complaint set up new matter in no way connected with the tax proceeding. But the statute, it will be noticed, does not in terms limit the "cause of objection" to matters pertaining to the levy and assessment of the tax, and it is evident that it did not so intend from the fact that it elsewhere provides that payment of the tax may be shown to defeat even a tax deed. Laws 1897, p. 190, § 114; *Smith v. Jansen*, 43 Wash. 6, 85 Pac. 672. It is evident, moreover, that while the respondent Brown has denominated his answer a cross-complaint, it is not in fact a cross-complaint, but is in reality a "statement of new matter constituting a defense," as the general practice act defines it, namely, a plea of payment. It alleges in effect that Baldwin while wrongfully in possession of the premises, and collecting the rents and profits, paid the tax, but for the purpose of cheating and defrauding the creditors of the former owner and the real owner of the property, took receipts and certificates of delinquency in the names of others. This being true—and it is confessed to be true by the demurrer—equity will not permit him to sell the land for the taxes so paid.

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We do not think, therefore, that the defense sought to be interposed is one forbidden by the statute.

It is next suggested that no defense can be pleaded against the appellant that could not be pleaded against the state itself. But conceding this to be true, it does not aid the appellant here, for as we construe the answer, it is a plea of payment, and payment can be pleaded against a foreclosure to recover supposed delinquent taxes even when the suit is by the state.

The contention that a tender of the taxes should have been made is met by the same objection. The taxes were paid at a time when the payor had money that rightfully belonged to the respondent which remained unaccounted for at the time this action was instituted. There was, therefore, no legal or moral obligation on the part of the respondent Brown to repay them to the appellant, who is confessedly but a dummy acting for the payor.

Again, it is said that it is lawful for one having a doubtful title to strengthen himself by procuring a tax title. Granted that this be true, there is no evidence in this record that such was the purpose of Baldwin. For the facts of the case, we must look to the respondents' answer, which the appellant confesses to be true. It is there alleged that Baldwin paid the taxes and took the receipts and certificates for the purpose of cheating and defrauding the respondent Brown, not for the purpose of strengthening his own title. This question therefore has no place in the case. It is the same with the contentions that it was Brown's duty to pay the taxes, that the appellant was not a party to the judgments set out in the answer, and that no credit is offered for the amount of the taxes on the judgments obtained against Baldwin. The record does not disclose any facts by which these contentions become pertinent.

The judgment is affirmed.

HADLEY, C. J., CROW, ROOT, MOUNT, and DUNBAR, JJ.,
concur.

[No. 6534. Decided April 6, 1907.]

H. C. VOGLER *et al.*, *Appellants*, v. W. T. ANDERSON *et al.*,
Respondents.¹

APPEAL—REVIEW—AMENDMENT OF PLEADINGS. In a trial before the court without a jury, defects in the pleadings capable of amendment will be disregarded and the cause tried *de novo* on the evidence as though the pleadings had been amended.

HIGHWAYS—OVER PUBLIC LANDS—PRESCRIPTION—GRANT—ACCEPTANCE. Adverse user by the public of a road across the public lands for a period of less than seven years does not constitute a highway by prescription or an acceptance of the Congressional grant of the right to establish highways over public lands, which is not a grant *in praesenti* without any act to establish the highway.

Appeal from a judgment of the superior court for Franklin county, Rigg, J., entered June 6, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for trespass. Reversed.

Zent & Lovell, for appellants.

W. D. Schutt (*A. C. Routhe*, of counsel), for respondents.

FULLERTON, J.—This action was brought by the appellants to restrain the respondents from trespassing on certain farm lands situated in Franklin county, it being alleged in the complaint that the respondents had, without color of authority, entered upon the appellants' premises, tore down the fences, drove with teams and wagons over their garden and fruit trees, and committed other injuries thereto, to the damage of the appellants in the sum of two thousand dollars. The respondents admitted entering upon the premises described and tearing down the fences, but justified their acts by pleading that they entered as county officers upon a county road, across which the appellants had wrongfully con-

¹Reported in 89 Pac. 551.

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Opinion Per FULLERTON, J.

structed the fence which they removed, pleading further that a road had been established across the appellants' land by adverse user. The cause was tried by the court without a jury, and resulted in a judgment for costs in favor of the respondents.

In this court each party insists that the pleading of the other is insufficient, but as the errors pointed out consist of defects capable of being cured by amendment, and the case was tried in the court below on the merits as if upon sufficient pleadings, this court will treat the pleadings as amended, and try the case *de novo* upon the record.

The evidence tended to show that, prior to March, 1903, the land of the appellants was unoccupied government land, subject to entry under the land laws of the United States; that some two years prior to that time, certain settlers living in the vicinity began to drive over it on their way from their homes to a place where they obtained water, and that between that time and March 1903, it was used as a highway by them for that purpose, and by other persons who had occasion to pass through that part of the country. At the date mentioned, the appellants settled on the land. They changed the travel somewhat, shortly after their entry, in order to accommodate their fences, but suffered it to continue over the route as changed for about one year thereafter, when they fenced up the entire tract, closing the road at the places where it entered and left the land. The respondents, as county commissioners of Franklin county, conceiving the road to be a public highway, ordered it opened, and the tearing down of the fences by the road supervisor constituted the trespasses complained of in the appellants' complaint.

The trial court based its judgment on the theory that the act of Congress granting a right of way for the construction of public highways over public lands not reserved for public use was a grant *in praesenti*, and became effective the moment the public began using the way as a public highway, and that it is not necessary that a way should be used for any specific

time in order to constitute an acceptance of it as a grant under this statute. The case of *Okanogan County v. Cheet-ham*, 37 Wash. 682, 80 Pac. 262, is cited as establishing this doctrine. In that case the trial court decided, by analogy to the statute of limitations for the recovery of real property, that, in order to constitute a way across public land, the user must have continued for a period of ten years or more. This court reversed that decision, holding that continuous user for a period of seven years was sufficient to establish the way as a public highway. But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. On the contrary, to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. If the road is established under the statute providing for their establishment by the board of county commissioners, it takes effect when the commissioners lawfully establish the road; but if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription. The shortest period allowed by statute to establish a highway by user in this state is seven years [Bal. Code, § 3846 (P. C. § 7860)], and no user short of this period can therefore be held to be an acceptance of the grant contained in the act of Congress cited. As the use in the case at bar had continued for at most but two years before the appellants entered upon the land, no right by prescription had been acquired, and the court erred in holding the way in dispute to be a public highway.

The judgment appealed from is reversed and the cause remanded, with instructions to enter a judgment perpetually enjoining the respondents and each of them from interfering with the appellants' fences, or attempting to open or maintain the way in question across their premises as a public

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highway. No judgment for damages will be allowed, but appellants will recover costs in both courts.

HADLEY, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 6583. Decided April 6, 1907.]

CHARLES F. NORMAN, *Respondent*, v. THE CITY OF
BELLINGHAM, *Appellant*.¹

APPEAL—REVIEW—VERDICTS. The verdict of a jury upon conflicting evidence is conclusive on appeal, even if against the weight of the evidence.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. In this state, the burden of proving the contributory negligence of the plaintiff is upon the defendant.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$500 for injuries to the driver of a delivery wagon, from a fall from his wagon, is not excessive, although the injuries were not permanent, where he expended \$75 for medical attendance and assistance, was kept from his work for six weeks, part of the time in bed, and suffered severely from contusions and wounds.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered October 1, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Henry C. Beach, for appellant.

Kellogg & Neal, for respondent.

FULLERTON, J.—The respondent, while driving a delivery wagon along one of the streets of the appellant city, ran the wagon against a rock which protruded from the bottom of the roadway. The jar from the impact threw him from the wagon to the ground, causing personal injuries for which he sued in this action. At the trial the jury returned a

¹Reported in 89 Pac. 559.

verdict in his favor for \$500, on which judgment was entered. The city appeals.

In the main the questions discussed by the appellant were conclusively determined against it by the verdict of the jury. Whether the city was negligent in suffering the obstruction causing the injury to remain in the highway, whether the obstruction was the primary cause of the injury, whether the city had notice of the obstruction, and whether the respondent was guilty of contributory negligence, were questions on which there was a substantial conflict in the evidence; and where such is the case, the verdict is conclusive in this court. We cannot substitute our judgment for the judgment of the jury, even when we are convinced that the verdict is against the weight of the evidence. The trial judge may properly grant a new trial on the ground that the weight of the evidence is against the verdict, but the right does not extend to this court. *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108.

The appellant, however, makes the point that the evidence failed to show affirmatively that the respondent was free from contributory negligence, and cites a number of cases from other jurisdictions holding that the burden is upon the person injured to show that his want of care did not contribute to his injury. Undoubtedly the rule contended for prevails in the jurisdictions from which the cases cited were obtained, but the rule is not general and was early repudiated by this court. In this state the burden is upon the party affirming it to establish contributory negligence, and where the evidence is silent as to the question, due care is presumed. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32; *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866; *Spurrier v. Front Street Cable R. Co.*, 3 Wash. 659, 29 Pac. 346; *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79.

It is finally urged that the verdict is excessive. The respondent was away from his work on account of his injury some six weeks, a part of which time he was confined to his

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bed. He expended for medical attendance, and for assistance rendered necessary because of his condition, some \$75. Under these circumstances, we do not think the verdict so large as to require interference by this court. It is true, no permanent injury was shown, but the respondent suffered severely from contusions and wounds caused by his fall, and was entitled to a reasonable compensation for his suffering.

The judgment is affirmed.

HADLEY, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 6505. Decided April 6, 1907.]

EDWARD M. HALL, *an Infant, by His Guardian ad Litem*
Ellen M. Hall, Appellant, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

STREET CARS—NEGLIGENCE—CONSTRUCTION OF TRACKS—RIGHT OF WAY—INSTRUCTIONS. In an action by a bicyclist who fell in front of an approaching street car, by reason of the alleged negligent construction of cross-over tracks, it is not error in instructing that the street car company had the preference right of way over its tracks, to state that consequently it was plaintiff's plain duty to avoid being on the track.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 16, 1906, upon the verdict of a jury rendered in favor of the defendant, in an action by a bicyclist to recover damages sustained in being run over by a street car. Affirmed.

Allen & Allen, for appellant.

H. M. Stephens, for respondent.

MOUNT, J.—Action for personal injuries. On a trial of this case in the court below, the jury returned a verdict in favor of the defendant. The plaintiff appeals.

¹Reported in 89 Pac. 553.

On July 16, 1908, the defendant was operating a double track street railway line across the Monroe street bridge, in the city of Spokane. This bridge was about one thousand feet in length, and extended north and south across the Spokane river. The bridge was constructed with a roadway about forty feet wide. The street railway tracks were located on each side of the center line of the bridge, and the distance between the two tracks was four feet ten inches. The rails of the tracks were four feet eight and one-half inches apart. The vehicle roadways on each side of the bridge, and on each side of the space occupied by the railway tracks and clear of the outer rails thereof, were about twelve feet six inches wide. The body of the cars operated upon the tracks extended outside of the rails about twenty inches. Near each end of the bridge, about seventy-five feet therefrom, the street car company had placed a cross-over track from one track to the other, so that cars might use only one of the double tracks while the bridge was being repaired. On the date above stated, the plaintiff, a boy of eleven years of age, was riding a bicycle across the bridge from the north to the south. He was riding in the center of the bridge between the double tracks. The railway company on that day was using both of the tracks, the easterly track for north-bound cars and the westerly track for south-bound cars. When the plaintiff went upon the bridge at the north end, he passed a car going south in the same direction he was traveling. He was traveling faster than the car. When he got near to the south end of the bridge about where the cross-over track was, he saw a north-bound car about seventy-five feet away, coming toward him. He testified that, when his wheel came to the rail of the cross-over track, he was thrown upon the westerly track and was rendered unconscious, and remained in that condition until the north-bound car came up to him and the fender thereof struck him; whereupon he regained consciousness and caught the fender with his hands, and was dragged about thirty feet, with the front wheel of

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the car upon his right foot; that the car was then stopped, and he was taken from under the car and to a doctor's office, where his right foot was amputated between the ankle and the knee; that when he fell, there was nothing between him and the approaching car, and that he was in plain view of the motorman. There was other evidence tending to corroborate all these statements of the plaintiff.

The defendant's evidence and contention was to the effect that the boy was just in front of the car and very close to it when he fell, and that he fell immediately against and under the car; that the car was running at no greater speed than three miles per hour, and was immediately stopped within seven feet after the boy fell. In view of the findings of the jury and the evidence, we think this was the fact of the case. The negligence alleged was that the defendant maintained these cross-over tracks so that the rails were about two inches above the planking of the bridge, and also that the motorman ran his car seventy-five feet and upon the boy while he was prostrate upon the track in plain view. These allegations of the answer were denied, and the evidence was in direct conflict upon them.

Appellant's first assignment is that the court erred in giving the jury the following instruction:

"At the time the accident occurred both plaintiff and defendant, in common with the public generally, had an equal right to the safe and reasonable use of the highway where the accident occurred, with this difference that the defendant, being confined by the nature of its occupancy to these tracks, had the preference and superior right to the reasonable use of such tracks at the time and place of the accident, and consequently it was plaintiff's duty to avoid being on the track or so close to it as to be in danger from the moving car."

It is claimed that the last part of this instruction, beginning with the words "and consequently," is erroneous, because it in effect tells the jury that the boy had no right upon the track, although he had been thrown there by his bicycle

striking the cross-rail. The instruction is not reasonably susceptible of the construction which appellant seeks to give it. All the court meant was what was said, viz., that both had an equal right to the reasonable use of the street at that point. Of course, both could not safely and reasonably occupy the street at that place at the same time. The street car could not leave its fixed rails. The plaintiff could ordinarily do so readily. It was therefore his duty to avoid the approaching car and keep a safe distance from it. *Helber v. Spokane Street R. Co.*, 22 Wash. 319, 61 Pac. 40; *Traver v. Spokane Street R. Co.*, 25 Wash. 225, 65 Pac. 284.

In the last-cited case substantially this same instruction was approved. See page 243, instruction numbered 14. The court, of course, did not mean, and did not tell the jury, that if the boy was lying prostrate upon the track the car could be run over him; and this is made plain in a subsequent instruction, to the effect that it was the duty of the motorman in charge of the car to keep constant lookout in front of him to see that there were no persons in a position to be injured by the car; and if the plaintiff was thrown prostrate upon the track in front of the car, it was the duty of the motorman to use his emergency appliances in order to stop the car most quickly.

The appellant next argues that the court erred in refusing to give his requested instruction numbered 3, as follows:

"The jury are instructed that, even though they may find the plaintiff guilty of negligence in attempting to ride his bicycle across the cross-track under the circumstances, yet if they find that the motorman operating the car that caused the injury saw the peril in which the plaintiff was placed in time to have stopped the car by the use of ordinary care and diligence before it ran upon the plaintiff, and he failed to do so, then the defendant is liable to the plaintiff for the injury received by him."

And refusing to give No. 10, which is in substance the same as the one just quoted, except it uses the words, "If . . . the . . . motorman by the use of reasonable care and

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diligence ought to have seen" the plaintiff. But we find that the court gave these instructions in substance when he said:

"If you find by a preponderance of the evidence that the plaintiff himself was negligent, and that this negligence was the proximate cause of the injury, then he cannot recover, unless the defendant, having knowledge of the plaintiff's negligence, could by the use of ordinary care have prevented the injury, . . . and the plaintiff could not recover unless, as I have already said, the defendant knew or should have known of plaintiff's negligence, and could by the exercise of reasonable and ordinary care have prevented the injury."

These instructions fully covered the requested instructions, which is all that is required.

Several other errors are alleged for refusal to give requested instructions, but we find that all of them were given in substance. We do not deem them of sufficient importance to justify us in setting them out here. It is sufficient to say that the instructions given by the court fully and fairly cover the law of the case in all its aspects.

Appellant also complains because the court denied the motion for a new trial, made upon the ground of insufficiency of the evidence. We are satisfied the court did not err in this respect. If the appellant's contentions were true, that he fell from his bicycle upon the railway track seventy-five feet in front of a slowly approaching car, and that there was nothing to obstruct the view of the motorman while the boy was there prostrate and unable to get out of the way of the car, and it was carelessly and negligently run upon him and injured him, he was certainly entitled to recover, and the court so told the jury. On the other hand, if the facts claimed by respondent were true, that the cross-over tracks were only flush with the floor of the bridge, and reasonably safe for ordinary travel, and if the boy rode near the moving car and fell against it or immediately in front of it, and the emergency brake was used immediately upon the motorman's seeing the boy fall, and the car was stopped within seven feet,

but notwithstanding this diligence the boy was injured, the respondent was not at fault and was therefore not liable. There was sufficient evidence to go to the jury upon these several disputed questions of fact, and the jury found against the appellant. We are not disposed to reverse their findings under these conditions.

The judgment is therefore affirmed.

HADLEY, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

[No. 6549. Decided April 6, 1907.]

SARA K. WATERMAN, *Appellant*, v. A. W. BASH, *Respondent*.¹

JUDGMENT—REVIVAL—COLLATERAL ATTACK. In a proceeding to revive a judgment, the jurisdiction of the court may be attacked by answer and the same is a direct attack on the judgment.

SAME—PROCESS—SUBSTITUTED SERVICE—EVIDENCE OF DOMICILE—SUFFICIENCY. In an attack upon a judgment in an action commenced by service of process at defendant's usual place of abode, as stated in the affidavit of service, the evidence is sufficient to show want of jurisdiction from the fact that defendant was a nonresident of the state at the time of service, where it appears that he had not lived there more than a few days each year for four years, during which time he was engaged in business in China or New York, where he lived, neither he nor his wife were living in the state at the time of the service, and the house was occupied by a daughter, to whom it belonged, and a third person to whom copy of process was delivered.

JUDGMENT—REVIVAL—APPEARANCE OF DEFENDANT—PROCESS—WAIVER. The appearance of a defendant to contest the revival of a judgment, void for want of service of process, does not waive service of process in the original action; and he cannot be required to answer the complaint upon entry of a decree setting aside the judgment.

Appeal from a judgment of the superior court for Island county, Hatch, J., entered August 9, 1906, upon findings in favor of the defendant, after a trial on the merits before the

¹Reported in 89 Pac. 556.

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Citations of Counsel.

court without a jury, dismissing proceedings to revive a judgment. Affirmed.

Harold Preston and *W. V. Tanner*, for appellant. The recital of service where there is nothing in the record to contradict it is conclusive upon that question when the judgment is attacked collaterally. *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20. An answer in a proceeding to revive a judgment is a collateral attack on the judgment. 17 Am. & Eng. Ency. Law (2d ed.), 848; *King v. Davis*, 137 Fed. 198; *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320; *Foster v. Crawford*, 80 Fed. 991; *Godfrey v. White*, 32 Ind. App. 265, 69 N. E. 688; *Vredenburg v. Snyder*, 6 Iowa 39; *Terry v. Sharon*, 131 U. S. 40, 9 Sup. Ct. 705, 33 L. Ed. 94; *Id.* 36 Fed. 337; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027. The recitals in the return of service were *prima facie* evidence of the defendant's domicile. *Northwestern etc. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139. The defendant was served at his domicile or usual place of abode. *Love v. Cherry*, 24 Iowa 204; *Wood v. Roeder*, 45 Neb. 311, 63 N. W. 853; *Lee v. Macfee*, 45 Minn. 33, 47 N. W. 309; *McFadden v. Garrett*, 49 La. Ann. 1319, 22 South. 358; *Du Val v. Johnson*, 39 Ark. 182; *Brigham v. Connecticut Mut. Life Ins. Co.*, 74 Minn. 33, 76 N. W. 952. The appearance was general and conferred jurisdiction for subsequent proceedings. *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504; *French v. Ajax Oil etc. Co.*, 44 Wash. 305, 87 Pac. 359; *Bennett v. Supreme Tent of the Knights of Maccabees*, 40 Wash. 431, 82 Pac. 744; *Teater v. King*, 35 Wash. 138, 76 Pac. 688; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Meyer Brothers v. Whitehead*, 62 Miss. 387; *Kelly v. Harrison*, 69 Miss. 856, 12 South. 261.

A. W. Buddress, for respondent.

MOUNT, J.—This action was brought by motion in the court below, to revive a judgment in favor of appellant against the respondent. The motion alleged, in substance, that, on May 7, 1900, Sara K. Waterman obtained a judgment against the respondent, A. W. Bash, for the sum of \$22,685.30 and costs, in the superior court of Island county, in this state; that said judgment was obtained upon a summons duly and regularly served upon the defendant; that no part of said judgment has been paid, and that the same was not appealed from, vacated, or set aside, but is in full force and effect, and that there is due thereon the sum of \$29,774.60, together with costs. The respondent appeared to this motion and filed an answer, alleging among other things, that when the original action was begun and judgment taken therein, he was a nonresident of the state and absent therefrom; that no service of summons or complaint was ever made upon him, and that the only service made or attempted to be made was shown by the record therein, as follows:

“Affidavit of Service. State of Washington, County of King, ss.

“R. J. Atwell, being first duly sworn upon his oath, deposes and says, that at all the times hereinafter mentioned and referred to he has been, and now is, a citizen of the United States, over the age of twenty-one years, and not a party to the within entitled action, and competent to be a witness upon the trial of the same; that he received the annexed summons on the 19th day of January, 1900, and on the 20th day of January, 1900, in the county of King, state of Washington, he duly and regularly served said summons upon within named defendant, A. W. Bash, by then and there delivering to and leaving with Miss E. S. Matthews, at said defendant's residence and usual place of abode, she being a person over the age of twenty-one years and of suitable age and discretion then resident therein, a true and correct copy of said summons, together with a true and correct copy of the complaint in the within entitled action. R. J. Atwell.”

that the defendant never in any manner appeared in said action, and judgment was taken by default; that the court

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acquired no jurisdiction of the person of the defendant, and that the judgment was therefore null and void. The reply of the plaintiff denied the allegations of nonresidence and want of jurisdiction. The case was tried solely upon the issue as to the residence and place of abode of the defendant. The trial court made the following findings thereon:

"That continuously between the 1st day of July, 1895, and the 28th day of February, 1906, the defendant Albert W. Bash, was out of, absent from, and a nonresident of, the state of Washington, and that defendant Albert W. Bash was out of, absent from, and a nonresident of, the state of Washington, both at the time of the filing of said complaint in said action and court and at the time of the purported service of the summons and complaint upon him, on the 20th day of January, 1900; and that the said purported service of the summons and complaint in said cause on the defendant, Albert W. Bash, on said 20th day of January, 1900, was made by said R. J. Atwell, by delivering to and leaving a copy of said summons and complaint with said Miss E. S. Matthews, at her residence and usual place of abode in said county of King, state of Washington, but not at the residence nor usual place of abode of the defendant, Albert W. Bash, as stated in an affidavit of service; and that the defendant, Albert W. Bash, had no residence nor usual place of abode in the said county of King, on the said 20th day of January, 1900, nor at the time of the purported service of the said summons and complaint on him in said cause, and that no summons nor complaint was ever served on the defendant, Albert W. Bash, in said action."

Upon the entry of the findings, the appellant moved for a judgment against the defendant for \$18,500, or, in the event of a denial of the motion, that defendant be required to answer the complaint in the original action within a time to be fixed by the court. The court denied both requests, and entered a judgment dismissing the proceedings to revive the judgment, and also vacating and annulling the original judgment. Plaintiff appeals, and contends, (1) that want of service cannot be shown upon collateral attack, except where such want of service appears upon the face of the record;

(2) that the answer of the defendant is a collateral attack upon the judgment sought to be revived; (3) that the evidence is insufficient to overcome the recitals of the return of service; and (4) that, in any event, the court should have required defendant to answer the original complaint.

The first two points made by the appellant may be considered together. It may be conceded for the purposes of this case that, as a general rule, want of service cannot be shown upon collateral attack, except where it appears upon the face of the record. Still this court has repeatedly held that, in a proceeding to revive a judgment, the jurisdiction of the court to render the judgment may be attacked by the answer, and that such answer is a direct attack upon the judgment and not a collateral attack. *Johnson v. Gregory & Co.*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. 907; *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Northwestern etc. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

In *Johnson v. Gregory & Co.*, *supra*, at page 111, this court said:

"In support of the proposition that the want of service of process may be shown in equity in opposition to the statement on the judgment roll, we cite Freeman on Judgments, § 495, and cases cited: 19 Amer. Dec. 437, note, and note to *Oliver v. Pray*, same volume, 603-612. These notes by the author contain an exhaustive compilation and review of the authorities, *pro* and *con*, and we are convinced from their examination that the great weight at least of modern authority sustains the view that the return of the officer may be assailed in a direct proceeding to set aside the judgment, in addition to defendant's right to proceed against the officer for damages. And this view of the law appeals to our judgment as being founded on the better reasoning."

In *Northwestern etc. Bank v. Ridpath*, *supra*, at page 696, we said:

"A cross-complaint is in the nature of an original action. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712. When the de-

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fendant files a cross-complaint, and seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes defendant in the cross-complaint. Pomeroy, Remedies & Remedial Rights, § 808. Under the authority of *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264, and *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141, we think the cross-complaint is a direct attack upon the judgment."

See, also, *State ex rel. Quincy v. Collins*, 31 Wash. 564, 72 Pac. 98.

The appellant next contends that the evidence is insufficient to overcome the recitals in the return of service. The particular recital referred to is that service was made at "defendant's residence and usual place of abode." There is no dispute in the evidence upon this point. The summons was left at a house in Columbia City, in King county, on January 20, 1900. The house was then in charge of Miss Matthews, who, with Mr. Bash's seventeen-year-old daughter, was living there. All the furniture, with the exception of a few chairs and a table, was owned by Miss Matthews. The house at that time belonged to Mr. Bash's daughter, who had purchased it with her own funds. Mr. Bash testified that he had been an actual resident of New York city since 1895. Both Mr. and Mrs. Bash testified that, from January, 1896, until December, 1897, Mr. Bash was in China on business. In September, 1897, Mrs. Bash rented the house while her husband was in China. On the 16th day of December, 1897, Mr. Bash returned from China and stopped with his family at this house until the 25th day of December, when he went on to New York where he was engaged in business. In April of 1898 he returned to his family in this state, upon telegraphic request, on account of the sickness of a child. He remained here about ten days, and again returned to New York, where he remained until the 10th day of September, 1898, when he again returned to his family in this state, and thereafter, on October 8, 1898, with his family, again sailed for China. They remained until October 23, 1899, when they again returned to this state and occupied the house until

the 21st day of November, 1899, when the family again left the state, Mr. Bash going to New York and Mrs. Bash with her youngest daughter to Ohio, the oldest daughter and Miss Matthews remaining in the house and living there. In February of 1900, Mrs. Bash joined her husband in New York, and they remained there until the fall of 1900, when they rented a house in Port Townsend, Washington. We think these facts show conclusively that, in January, 1900, when the summons was left with Miss Matthews, the house where she lived was not the house of defendant's usual abode, because neither he nor his wife was living there at that time. Mr. Bash had lived there only a few days in each year for more than four years. The statute evidently means that summons shall be left at the house where the defendant lives and which he habitually occupies at the time the service is made. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398.

We do not think the court erred in refusing to require the defendant to appear or answer the original complaint. This was an independent action or proceeding, and the defendant's appearance herein was not a waiver of service in the original action. Defendant has a right to be brought into court in the regular way, and to stand upon such right.

We find no error in the record, and the judgment is therefore affirmed.

HADLEY, C. J., ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

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[No. 6570. Decided April 6, 1907.]

THE STATE OF WASHINGTON, *on the Relation of John D. Atkinson, as Attorney General, Respondent, v.*

ERNEST E. EVANS, *Appellant*.¹

ALIENS—RIGHT TO ACQUIRE REAL ESTATE—MINERAL LANDS—CONSTITUTIONAL LAW—CONSTRUCTION. An alien can acquire lands in this state containing deposits of limestone, silica, silicated rock and clay, to be used in good faith in the manufacture of cement, such deposits being "minerals" within the meaning of Const., art. 2, § 33, and not to be restricted by the words "metals, iron, coal or fire clay," following; since a construction must be adopted to give effect to every part of the clause and to give words their natural and ordinary meaning.

CONSTITUTIONAL LAW — RULES OF CONSTRUCTION. Contemporaneous construction of words and phrases used in the constitution should have great weight in their construction.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered October 20, 1906, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defense, in an action to escheat certain lands purchased by an alien. Reversed.

Campbell & Powell and *Dorr & Hadley*, for appellant.

The Attorney General and *A. J. Falknor*, *Assistant*, for respondent.

MOUNT, J.—This action was brought against the appellant, to escheat to the state certain lands in Whatcom county, which lands were purchased by, and stood of record in the name of the appellant. A judgment was entered as prayed for, and this appeal followed. The complaint alleges, that the defendant was and is an alien and has not declared his intention to become a citizen of the United States; that

¹Reported in 89 Pac. 565.

on May 4, 1906, the Western Estates Company, a corporation, made and delivered a deed of certain described lands to the defendant; that the said lands were not acquired by inheritance or under mortgage made in good faith in the ordinary course of the collection of debts, and that the lands do not contain valuable deposits of minerals, metals, iron, coal, or fire clay, nor are they necessary for mills or machinery to be used in the development thereof, or the manufacture of the products therefrom; that the defendant is claiming to be the owner of said lands. The defendant answered the complaint, admitting all the allegations above stated except the one, that the lands contained no valuable deposits of minerals, metals, iron, coal, or fire clay, etc., which was denied; and as an affirmative defense alleges that,

“The land described in the complaint as the north half of the northeast quarter of the northeast quarter of section 28, township 40, north, of range 5, E. W. M., contains valuable deposits of mineral, to wit, limestone; that the land described in the complaint as the northwest quarter of the northwest quarter of section 27, in said township and range, contains valuable deposits of minerals, to wit, silicated clay; that the land described in the complaint as beginning at the section corner common to sections 7, 8, 17 and 18, in said township and range, and running thence north along the line between sections 7 and 8, three hundred feet to a point; thence east six hundred and eighty feet; thence south three hundred feet; thence west six hundred and eighty feet to the place of beginning, situate in section 8 in said township and range, contains valuable deposits of minerals, to wit, silica, silicated rock and clay; that limestone, silica, silicated rock and clay are minerals necessary to be used in the manufacture of cement; that the defendant purchased said lands in good faith and without any design or intent to violate the constitution or statutes of the state of Washington touching the acquisition of lands by aliens, but on the contrary for the express and only purpose of extracting from said lands said limestone, silica, silicated rock and clay and manufacturing the same into cement, and defendant and his associates in good faith intend to, and are about to, extract said limestone, silica, silicated

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rock and clay from said lands and manufacture the same into cement."

The lower court sustained a general demurrer to this affirmative defense. Defendant stood upon the allegations thereof, and a judgment was entered as prayed for.

The question in the case is, may an alien by purchase acquire lands in this state, which lands contain valuable deposits of limestone, silica, silicated rock, and clay, and the necessary lands for mills and machinery to be used in the development thereof and the manufacture of such deposits into cement? The answer to this question depends upon the construction of § 33 of article 2 of our constitution, which is as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien, shall be void: *Provided*, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens shall be considered an alien for the purposes of this prohibition."

There can be no doubt that the term "minerals" in its broad and comprehensive meaning includes limestone, silica, silicated rock and silicated clay—in fact, all matter which is not vegetable or animal. If the constitution had used the expression "valuable deposits of minerals" in the same connection, without the use of the words "metals, iron, coal or fire clay," then there could be no doubt of the intention of that provision to permit aliens to purchase lands containing valuable deposits of limestone, silica, or silicated clay, or any other mineral substances for which the land was chiefly valuable, for the purpose of manufacturing mineral products therefrom.

But it is argued by the respondent, plausibly indeed, that by the use of the words "metals, iron, coal, or fire clay," immediately following the general word "minerals," it is the intention of the constitution to restrict the meaning of that general word to the valuable mineral ores containing gold, silver, copper, lead, etc. But this argument is very much weakened, if not entirely destroyed, by the fact that the word "metals," as commonly used and understood and as used in this section of the constitution, includes all the precious metals named, and therefore the use of the general word "minerals" was superfluous; and if it was the intention to limit the general term "minerals" and "metals" to the specific substances iron, coal, or fire clay, then the words "minerals" and "metals" are both superfluous.

"The rule applicable here is, that *effect is to be given, if possible, to the whole instrument*, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that *words have been employed in their natural and ordinary meaning*. As Marshall, Ch. J., says: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.'" Cooley, Constitutional Limitations (6th ed.), pp. 72, 73.

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We must, therefore, conclude that each of the words "minerals," "metals," "iron," "coal," or "fire clay," was used for a purpose in its natural and ordinary meaning, leaving as little as possible to implication or interpretation, and that one word was not used necessarily to restrict or modify the meaning of another word, but was used to make definite the rights of aliens to acquire lands containing valuable deposits of minerals, whether metals or not, and any kind of metals whether iron or not, and any kind of iron, coal, or fire clay, where such lands are chiefly valuable for such minerals.

In the case of *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575, the supreme court of the United States, in considering the meaning of the words "mineral lands," as used in the act of 1864 granting certain lands in aid of the railway company, said:

"The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. . . . Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are 'mined,' as distinguished from those which are 'quarried,' since many valuable deposits of gold, copper, iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone, in France, is excavated from mines running far beneath the surface. This distinction between underground mines and open workings was expressly repudiated in *Midland R. Co. v. Haunchwood Co.*, L. R. 20 Ch. Div. 552, and in *Heat v. Gill*, L. R. 7 Ch. App. 699. . . . Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word 'mineral,' it is clear that in 1884, when the line of this road

was definitely located, it had come to be understood as including all lands containing 'valuable mineral deposits,' as well as lands 'chiefly valuable for stone,' and that when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word 'mineral' had by successive declarations of Congress been extended to include all valuable mineral deposits."

Contemporaneous construction of words and phrases used in the constitution has great weight in determining the meaning of such words. Cooley, Const. Lim. (6th ed.), p. 82. Our constitution was adopted in 1889, after Congress had given the word "minerals" the construction above indicated. The court in the case above cited, further considering the meaning of the word "minerals," said, at page 534:

"The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation, and there is practically no conflict in them. The decisions of the state courts have also favored the same interpretation. Thus in *Gibson v. Tyson*, 5 Watts 34, chromate of iron was held to be included in reservation of all mineral. In *Hartwell v. Camman*, 10 N. J. Eq. 128, a grant of 'all mines, minerals, open or to be opened,' was held to include paint stone, on the ground that it was valuable for its mineral properties—the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk v. Haldeman*, 53 Pa. St. 229, and in *Gill v. Weston*, 110 Pa. St. 313, petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See, also, *Gird v. California Oil Company*, 60 Fed. Rep. 531. The same prin-

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ciple was extended in *W. & C. Natural Gas Company v. DeWitt*, 130 Pa. St. 235, to natural gas, which was said to be a mineral *ferre naturae*. In *Armstrong v. Lake Champlain Granite Company*, 147 N. Y. 495, a conveyance of 'all mineral, and ores,' was held to include granite subsequently discovered on the premises, though it would not pass under the name 'mineral ores.' In *Johnson v. Harrington*, 5 Washington 73, 78, the supreme court of that state thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler v. Smith*, 5 Washington, 704, holding that the term mineral was only intended to embrace deposits of ore. The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. . . . We do not deem it necessary to attempt an exact definition of the words 'mineral lands,' as used in the act of July 2, 1864. With our present light upon the subject in might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture."

The reasoning and conclusion reached in that case are, in our opinion, unanswerable, and set at rest the question as to the natural and ordinary meaning of the words "minerals" and "valuable deposits of minerals," as used in our constitution. We have therefore quoted the argument at length from that opinion, and adopt it in this case.

Since it is admitted that the lands held by appellant contain valuable deposits of limestone, silica, silicated rock, and clay, and that the same were acquired and are held in good faith for the purpose of manufacturing those minerals into

cement, the appellant is within the constitutional provision and therefore authorized to hold the lands for that purpose.

We may say, in reference to the case of *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784, that that case was one where this court was construing a statute of the United States, and because a different construction of the word "minerals" has since been reached by the supreme court of the United States in a similar statute, the decision in *Wheeler v. Smith*, *supra*, ceases to be an authority upon that question.

We are therefore of the opinion that the trial court erred in sustaining the demurrer to the affirmative answer. The cause is reversed and remanded for further proceedings consistent with this opinion.

HADLEY, C. J., ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 6515. Decided April 8, 1907.]

H. L. TATUM *et al.*, Appellants, v. W. A. GEIST *et al.*,
Respondents.¹

SALES—ACCEPTANCE—EVIDENCE—SUFFICIENCY. Where, upon the sale of a planing machine, the vendors agreed to accept a return of the same if the machine was not satisfactory, the evidence shows that there was no acceptance or liability for the price, where it appears that, instead of a new machine, one was sent which had been used, with which the vendees from the first and repeatedly thereafter expressed dissatisfaction, specifying various defects, which experts of the vendor could not remedy, the vendees finally offering to return the machine, and where it appears that the setting up and attempted use of the machine by the vendees for two months was by direction of the vendors under a promise to make it perfectly satisfactory before asking for any money; since the vendees were sole arbiters as to satisfactory performance, and expressed dissatisfaction within a reasonable time.

Appeal from a judgment of the superior court for Clallam county, Hatch, J., entered April 5, 1906, upon findings in

¹Reported in 89 Pac. 547.

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favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Shank & Smith, for appellants.

Trumbull & Trumbull, for respondents.

MOUNT, J.—Appellants brought this action to recover the contract price of a planing machine sold to respondents. The cause was tried to the court without a jury. Findings were made and judgment entered in favor of the defendants. The plaintiffs prosecute this appeal.

The facts are as follows: On November 20, 1903, the respondents ordered a new Northwest planer from the plaintiffs' agent at Seattle. The agent agreed to have the machine forwarded from Portland, Oregon. Thereupon the following memorandum of agreement was entered into:

“11-20-03.

“Terms 3 per cent. off for cash, or 1-3 down, bal. 3 mos., or 1-2 down, bal. 6 mos. Charge to W. A. Geist, Postoffice address Port Angeles. Ship to Port Angeles, . . . 1 26x8, 6' roll, divided roll, new Northwest. To be furnished with 1 complete set of Philbrick Matcher heads for flooring and shiplap, \$1,100. Because machine is not at this store for inspection, we agree to accept return of same, free of expense, to Tatum & Bowen, provided the machine is not satisfactory.

“Tatum & Bowen, By C. A. Taber. W. C. Geist.”

In pursuance of this contract, a machine was ordered from Portland, Oregon. It arrived in Seattle the last day of November, 1903, and was then found by appellants' agent to be a machine which had been used; but it was immediately forwarded to the respondent at Port Angeles, and a letter was written by Mr. Taber, the appellants' agent, explaining that the machine had been used slightly, but that it was a new machine and all right. This letter closed by saying:

“Kindly do what you can towards setting the machine up and putting it in operation, and if you have any difficulty

in starting it wire us and we will have Mr. Arper go there at once and straighten out any trouble that you have."

In due course the machine arrived at Port Angeles, and on December 7, 1903, respondents wrote to appellants, saying that, after unpacking the machine, they found some defects and part of the flanges on the feed cone broken, and "you understand that you sold us a new machine and we expect that you will send us a new cone and any other parts that are defective. . . . We expect you to make it right. All we ask is fair treatment." On January 7, 1904, respondents wrote to appellants again, calling attention to some broken knives and insufficient wrenches. On January 30, 1904, appellants sent to respondents a statement of account and requested the amount of cash payment "which you agreed to make upon delivery of the machine." Respondents then wrote appellants as follows:

"In reply to yours of the 30th ult., I wish to say that evidently you have overlooked the agreement governing the purchase of the planer, or you would not ask me to sign notes with interest, and you would no doubt have received a check for part before this had I been satisfied that the planer is all right. I find that the lower cylinder collar is not trued up, thus letting it go back and forth, and another thing is the feeding of the planer is very poor. At times it wont feed a 4 inch piece of flooring strips, and I have been trying in several ways to adjust it but up to the present time I have not succeeded and I am beginning to think that possibly the machine has been refused by other parties for that reason. If you know of any way that might do some good I would be glad to hear from you. I would also say that you have failed to send me a new feed cone. . . . We have no 5-8 wrench, and no 1-2 socket wrench to tighten up the side head pulleys with, and the wrench sent to tighten the upper and lower cylinder knives with is entirely too short and weak."

On February 8, 1904, appellants answered this letter, saying:

"We are very much disappointed at the tone of your letter of Feb. 4, because we were sure that the machine would be

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perfectly satisfactory. The cone pulley was immediately ordered from the factory but was sent through our Portland office and we are writing to them this afternoon to find out whether they have heard anything from it or not. As soon as Mr. Arper returns to Seattle, he being at present in Portland, we will have him run over and go carefully over the matter with you and put the planer in proper running order. We are satisfied that there is nothing wrong with the machine primarily and assure you now that it was not returned through any dissatisfaction with it; that it went out, as we said before, as an accommodation for a customer and if, unfortunately for us, they abused the confidence we placed in them we shall stand good for it. We shall see that the machine is perfectly satisfactory before we ask you for any money."

The matter went on this way, respondents continually expressing dissatisfaction. Appellants thereafter sent three experts at different times to adjust the machine, but the machine was still not satisfactory, until on September 10, 1904, respondents expressed themselves as "thoroughly disgusted with the same," and offered to return the machine to the appellants, which offer was refused. Soon thereafter the respondents' mill, together with the planer, was destroyed by fire. Soon thereafter this action was begun.

The contract is clear, to the effect that appellants would accept a return of the machine if it should prove unsatisfactory to the respondents. Even if the contract were susceptible of the construction which appellants now seek to place upon it, viz., that "the clause in the contract guaranteed to the defendants merely the right to determine from an inspection whether the machine were satisfactory, and by setting up in their mill defendants accepted it," the parties themselves did not so understand the contract or so construe it at the time, because on February 8, 1904, after the respondents had used or tried to use the machine for two months, appellants say: "We shall see that the machine is perfectly satisfactory before we ask you for any money." This is conclusive to our minds that the contract meant, and the

parties understood it to mean, that the machine should be satisfactory to the respondents. Where there is an agreement that an article shall be satisfactory to the buyer, "it is generally held that he [the purchaser] is the sole arbiter of the performance according to the agreement. It is not enough to show that the promisee ought to be satisfied and that his discontent is without reason." 24 Am. & Eng. Ency. Law (2d ed.), p. 1236.

See, also, 9 Cyc. 620; Benjamin, Sales (7th ed. Bennett's), page 607, and cases there cited.

It follows, of course, that dissatisfaction must be expressed within a reasonable time. 9 Cyc. 625. After carefully examining the evidence in this case and especially the letters in the record, it conclusively appears that the respondents expressed dissatisfaction from the start and clearly within a reasonable time. It is true that one of the experts sent to adjust the machine testified that, after he had made some repairs upon it, one of the respondents expressed his satisfaction. But respondents' letters before and after this time show conclusively that they were never satisfied, and that neither they, nor their employees, nor the experts sent by appellants to make the machine work, could make the machine do the quality or the amount of work it was represented to do.

We are satisfied that the lower court found the facts in accord with the weight of the evidence and that the judgment is right. It is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

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[No. 6577. Decided April 8, 1907.]

ROLAND A. BUNDY, *Respondent*, v. UNION IRON WORKS,
Appellant.¹

MASTER AND SERVANT — INJURIES — CONTRIBUTORY NEGLIGENCE — METHODS OF WORK. An employee, injured by contact with a set screw upon a revolving shaft, while attempting to throw a rope over a beam for the purpose of removing the shaft, is guilty of contributory negligence precluding a recovery, where he placed his ladder against the west side of a post and climbed up and leaned forward in proximity to the collar on the revolving shaft in order to throw the rope over the beam, when he might have placed the ladder and climbed up on the east side of the post and put the rope over without coming near the shaft; inasmuch as it was contributory negligence for him to voluntarily adopt an unsafe method of doing the work where there was evident a safe way.

SAME—FACTORY ACT—DEFENSE OF CONTRIBUTORY NEGLIGENCE. The defense of contributory negligence in the adoption by a servant of an unsafe method of work, when he might have adopted a safe way, is not precluded by the factory act requiring the guarding of dangerous machinery.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered May 23, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through being caught on a set screw in a revolving shaft. Reversed.

Post, Avery & Higgins, for appellant.

Hamblen, Lund & Gilbert, for respondent.

Root, J.—Plaintiff brought this action for damages on account of personal injuries sustained by being caught upon a set screw in a collar on a revolving shaft in the boiler room of defendant's foundry. From a judgment in favor of plaintiff, this appeal is taken.

¹Reported in 89 Pac. 545.

The shaft in question was situated about fourteen or sixteen feet above the ground floor, running north and south, and was attached to the west side of a row of posts composed of heavy 12x12 timbers. Respondent was assisting one Thoms, who had charge of the work of removing said shaft for appellant. Upon the shaft was a collar fastened with a set screw which projected about a quarter of an inch beyond the flanges of the collar. Some three feet below the shaft there were attached to the post certain arms extending outward in each direction, and upon those arms a temporary staging was built on the west side of the posts. Some feet above the shaft, and extending from one post to another, was a heavy beam. Plaintiff was directed to throw ropes over the top of this beam, near each of two of these posts, so that one end of each rope might be attached to the shaft which it was desired to thereby take down, as appellant was remodeling that portion of the building. Plaintiff took one rope and climbed upon a ladder set against the side of what we will call the south post, and threw the rope over the beam above, from the east side. He then climbed down and secured another rope and carried his ladder to the next post to the north. Instead of placing his ladder against the side of this post and throwing over the rope from the east side, in a manner similar to that which he had followed in the other instance, he went around to the west side of the post and climbed up and, while standing upon the ladder or upon a plank or scaffolding resting upon the arms attached to the posts, on the west side, leaned forward to throw the rope up over the beam from that side. In so doing his clothing came in contact with the set screw and he was very seriously injured. Appellant urges, (1) that there was a failure of proof as to defendant's negligence; (2) that plaintiff was guilty of contributory negligence, and (3) that he assumed the risk. We will consider the evidence with reference to contributory negligence.

It is urged by appellant that, inasmuch as the shaft and the collar were in plain sight, respondent was guilty of neg-

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ligence in attempting to throw the rope while standing at a place where his body would likely come in contact with said shaft and collar, even though he could not see that the set screw was projecting. It is also urged that appellant was guilty of contributory negligence in that he voluntarily selected a hazardous method of doing his work when a perfectly safe one was available. Immediately to the east of the posts upon which the line shaft was attached was an open space with nothing upon the floor or elsewhere to interfere with respondent's moving his ladder, handling his rope, or climbing up alongside the posts so as to throw the rope over the beam. To the west of said posts the floor was partially occupied, and there were belts running from certain pulleys upon the shaft to machinery in other parts of the foundry, and a person standing upon the ladder against the post, or upon the scaffolding, would necessarily be brought near or against the shaft. While climbing the ladder upon the east side of the post, he would have the width of the post (twelve inches) between the shaft and the place where the top of his ladder rested; and to reach the beam overhead there would be no occasion whatever to get near the shaft. Upon the trial of the case a large model was used and placed in evidence, and the same was brought to this court for our inspection. The evidence of the respondent himself, together with an examination of the model, shows plainly that the method adopted by the respondent in throwing the first rope over the beam was a perfectly safe one; that with his ladder upon the east side of the post it was practically impossible for him to come in contact with the shaft or set screw; that he was just as near the beam on that side as he would be on the other; that there was no rubbish, no belts, no shaft, nor anything else in the way of his adopting the same method in putting over the other rope; that instead of following the same method, he undertook to put the second rope over from the west side, placing his ladder and himself in a position where, in throwing the rope, he would naturally lean against

the shaft. He saw the shaft and the collar, and knew that they were rapidly revolving. He had worked for respondent for several months, and must have known that there was danger in coming in contact with a revolving shaft. No reason is given for his not putting over the second rope from the east side as he had done with the first one.

It appears to us that the conclusion is irresistible that this unfortunate man voluntarily chose to do this work in a hazardous manner when a perfectly safe method was open and known to him, a method which he had already tested but a few moments before. The proposition is thoroughly established by the courts that, where an employee voluntarily elects to perform a given service in a perilous manner when a perfectly safe method is open and known to him, he is guilty of such contributory negligence as will defeat a recovery as against his employer. In this case plaintiff in his complaint sets forth two causes of action, one a common law action and the other under the factory act. At the close of plaintiff's case defendant moved for a dismissal. In passing upon that motion, the trial court used the following language:

"The court can readily see from that model and with the admissions, that there were a number of ways that rope could have been thrown over that timber—anybody can see it should have been thrown over the east side instead of the west side; it could have been thrown over from the north end, or very probably it could have been thrown over from underneath, by putting the ladder up against the south side of the north post. But the plaintiff chose another way of going on to the plank in question, on the west side and putting the rope over that way, and it is evident, in the mind of the court, that that was the most dangerous way he could have selected, because in that way he was in immediate contact with the collar and set-screw, whereas, upon the other side, the north post would have been between the collar and set-screw and the plaintiff. The post, of course, itself would have protected him."

The court thereupon dismissed the common law cause of action, but denied the motion as to the statutory cause, upon the theory that the conduct of appellant in selecting the more

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dangerous method could be urged against him only upon the plea of assumed risk, a defense not permitted as against the statutory liability. In this, we think, the learned trial court was in error. This conduct of plaintiff was contributory negligence, and this court has held that this defense is not cut off by the factory act. *Hunter v. Washington Pipe & Foundry Co.*, 48 Wash. 167, 86 Pac. 171; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981.

In the case of *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385, this court said:

"The rule is well settled that, where there are two methods by which a service may be performed, one perilous and the other safe, an employe, who voluntarily chooses the perilous rather than the safe one, cannot recover for an injury thereby sustained."

In the case of *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881, a case where the injury was occasioned in a manner similar to that in the case at bar, this court said:

"And appellants contend that, instead of climbing upon the band rack, the deceased could have easily stood upon these benches and tied back the belt without coming near, or in contact with, the shaft or set screw; that this method was perfectly safe, and that, had it been adopted, Stratton would have been in no danger whatever whether the machinery was moving or not. We think this contention should be sustained."

In the case of *Beltz v. American Mill Co.*, *supra*, the court said:

"There were two ways in which the sawdust could be removed, the one free from danger, the other fraught with danger. The appellant voluntarily chose the latter, and should not now be permitted to visit the result of his misfortunes and indiscretions upon others."

And again:

"The court must consider, not only what the appellant knew, but what he should have known by a proper exercise of his faculties."

In the case of *Bier v. Hosford*, 35 Wash. 544, 554, 77 Pac. 867, the court employed this language:

"Physical facts, apparent to individuals of the most ordinary understanding, particularly those things capable of sensation and touch, cannot be overcome or discredited by word of mouth. Courts and juries in such instances are not warranted in making erroneous deductions from known premises."

In *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, the court quoted approvingly from *Day v. Cleveland etc. Co.*, 137 Ind. 206, 36 N. E. 854, as follows:

"In a case where the servant is one of mature years and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. . . . The law requires that men shall use the senses with which nature has endowed them; and, when without excuse one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him."

In *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679, the court gave this expression:

"Men, when they are working around dangerous machinery, must notice. Their faculties and senses are given them for the purpose of self-preservation, and they must exercise them to a reasonable extent."

See, also, *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 109 Am. St. 917; *Lewis v. Simpson*, 3 Wash. 641, 29 Pac. 207; *Laidley v. Musser Lumber & Mfg. Co.*, 45 Wash. 239, 88 Pac. 124; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; Wood, Master & Servant, § 328.

Whatever negligence there may have been on the part of the defendant, it is conclusively evident that the respondent, by his lack of proper care in voluntarily choosing an unsafe

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instead of a safe method and thereby placing himself unnecessarily in a position of known danger, contributed to the negligence which occasioned his injury. The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., RUDKIN, MOUNT, and CROW, JJ., concur.

[No. 6809. Decided April 8, 1907.]

SARAH AGNES BULL *et al.*, *Appellants*, v. THE CITY OF
SPOKANE, *Respondent*.¹

MUNICIPAL CORPORATIONS — NEGLIGENCE — DEFECTIVE SIDEWALK — QUESTION FOR JURY. In an action against a city to recover for a fall upon a sidewalk, evidence of the plaintiff that she was on the sidewalk when she fell is sufficient to make a question for the jury as to such fact.

SAME—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. In an action to recover for a fall upon an icy sidewalk, there is sufficient evidence of negligence upon the part of the city, where it appears that the snow and ice had been piled up for four weeks on the sidewalk, which was very slippery, and that people had to take the middle of the road to avoid falling, nothing having been done to remove the snow and ice for about four weeks.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 3, 1906, dismissing an action for personal injuries sustained by a pedestrian in falling upon a sidewalk, after a trial on the merits before the court and a jury. Reversed.

Munter & Jesseph, Munter & Lowjoy, and S. R. Stern,
for appellants.

J. M. Geraghty and Alex. M. Winston, for respondent.

Root, J.—This action was for damages arising from personal injuries sustained by appellant Sarah Agnes Bull in

¹Reported in 89 Pac. 555.

falling upon one of respondent's sidewalks. From a judgment of dismissal on plaintiffs' case, this appeal is taken.

It is urged by respondent that the evidence fails to show that said appellant fell upon the sidewalk, and that it also fails to show that the ice and snow, which are claimed to have been the cause of the fall, were in such condition as to constitute negligence on the part of the city. The evidence of said appellant herself is that she was upon the sidewalk at the time when she fell. This was sufficient to carry the case to the jury upon that point. As to the condition of the ice and snow upon the sidewalk, the following extracts of evidence may be cited: One witness testified:

"Well, it was very icy; about an inch and a half of ice there, I should say; and then there was snow on top of that ice, and it was impossible to go up along there even with rubbers, so we used to take the middle of the road where the wagons had gone over in going to our meals."

In reference to whether the ice and snow were smooth or otherwise, Mrs. Bull, being asked if there were any bumps there, answered: "I didn't know whether there were any bumps there or not that night. When I fell it seemed all bumps." "There was nothing but snow and ice on it there, ice and snow all piled up there." Other portions of the evidence were as follows:

"Q. Do you know the condition the sidewalk was in, at that place, on the day Mrs. Bull fell? A. Yes, sir. Q. What was that condition? A. Icy, slippery, all snow and ice; we would have to take the middle of the road half the time. . . . Q. How long had that condition existed prior to the day Mrs. Bull was brought in there? A. Oh, for several weeks, during cold weather. . . . Q. Had you during that time observed any cleaning off of that sidewalk at the place where this accident occurred? A. No, none whatever, because my window faces on that sidewalk. I can see it every day, and there was no cleaning done at all there. . . . A. It was all very slippery, from the little alley way which runs on the north side of Brancy Court clear down to Riverside avenue. It was all in the same condition along there,

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very slippery with snow and ice. Q. Describe it as accurately as you can, so that the jury may form an idea of the condition it was in at that time? A. Well, it was glassy, icy, I should say; I noticed it because when myself and wife went to dinner, instead of going down the sidewalk, after trying it once or twice, we took the middle of the road, because it was safer. . . . Q. How long had that condition, that you have just described, existed—the condition of the sidewalk? A. I should say two or three or four weeks; I didn't pay very much attention to it. Q. Had you ever noticed during that time that the sidewalk was cleaned off at all? A. Yes, sir, I noticed it was always in the same condition. Q. I asked you if you ever noticed it had been cleaned. A. No, I never noticed that it was cleaned off. . . . Q. Just describe to the jury the exact condition of the sidewalk there at that point, as near as you can. A. Well, there had not been any snow cleaned off of it there during the winter, and I think there was a path that went down about through the center of the sidewalk, somewhere near the center, a path three or four feet wide, and it was pretty icy; and I think the sides of the walk, the edges of it had more or less snow on it, was not so slippery; there had been no snow taken off of it that I know."

We think this evidence was sufficient to take the case to the jury, and it was for the latter to say therefrom, under all the circumstances and the court's instructions, whether the condition of the street at the time of the accident was such as to constitute negligence on the part of the city. Cities cannot be held to a rigid accountability because of their sidewalks being rendered dangerous from natural accumulations of ice and snow. Where ice and snow accumulate upon a sidewalk in the ordinary manner, the city must be allowed due time to remove the same or to so deal with the conditions as to render the walks as reasonably safe as could ordinarily be expected under the circumstances. But it is a self-evident fact that where ice and snow are "piled up" on a sidewalk so as to render it exceedingly slippery it is a dangerous condition; and where that condition amounts to an obstruction to ordinary travel and is permitted to remain for several

weeks without any effort on the part of the city to remedy it or protect pedestrians therefrom, it is sufficient to charge the city with negligence, in the absence of any reasonable justification being shown. The evidence here is to the effect that the snow and ice was "piled up" on the sidewalk and that it was exceedingly dangerous to walk upon this sidewalk in the condition it was in at the time of this accident, and that said condition was a serious obstruction to ordinary travel and had obtained for several weeks; that Mrs. Bull did not know of its slippery, dangerous, condition; that it was after dark. This evidence was sufficient legally to present the questions to the jury as to whether the city was negligent and as to whether such negligence was the proximate cause of Mrs. Bull's injuries. *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Ziegler v. Spokane*, 25 Wash. 439, 65 Pac. 752; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847.

In justice to the learned judge who tried this case, it is conceded by counsel that, upon the settling of the statement of facts, he announced that, in granting the motion to dismiss and in denying the motion for new trial, he had inadvertently overlooked a material portion of the evidence hercinbefore quoted; that otherwise his rulings would have been different upon those motions.

The judgment of the honorable superior court is reversed, and the cause remanded for a new trial.

HADLEY, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.
FULLERTON, J., dissents.

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[No. 6560. Decided April 9, 1907.]

LEO NOREN, *Respondent*, v. LARSON LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—INJURIES—GUARDING DANGEROUS MACHINERY—FACTORY ACT—EVIDENCE—QUESTION FOR JURY. Whether gearing for rollers bearing off lumber from a saw were sufficiently guarded under the factory act is properly for the jury, where, from some of the defendant's own testimony, it appeared that while the guard, which covered only the upper half of the gearing, was in common use, it was not primarily a safety guard but rather one against the accumulation of waste clogging the gears, and that it was no protection against the lower portion of the gearing, a few inches from the floor, along which the plaintiff was compelled to work.

SAME—ASSUMPTION OF RISK—INSTRUCTIONS. In an action by an employee for injuries sustained through the master's failure to comply with the factory act requiring the guarding of machinery, instructions to the effect that the employee assumed the risks, if the same were equally as evident to the servant as to the master and the master had made a *bona fide* attempt to comply with the factory act, are properly refused.

SAME. In such an action, an instruction that failure to provide a guard that would have prevented the injury is not of itself proof of failure to comply with the law, if the master had guarded against accidents that could reasonably be anticipated, is as favorable to the defendant as can be asked (Root and Crow, JJ., dissenting).

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered May 20, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an offbearer in a sawmill. Affirmed.

Dorr & Hadley, for appellant.

Pemberton & Sather, for respondent.

FULLERTON, J.—This is an action for personal injuries. The appellant owns and operates a lumber mill, and the respondent was one of its employees. In the lumber mill of the

¹Reported in 89 Pac. 563.

appellant, leading from the main saw to the back part of the mill, was a series of rollers, known as live rollers, their purpose being to assist the offbearers in carrying the timber products which passed through the main saw to other parts of the mill. The rollers were set into a table, the top of which was about twenty-three inches from the floor, and were about four feet apart. They were kept alive by being geared to a line shaft fastened to the side of the table on which the rollers were placed and running parallel therewith. The means of connection were two bevelled gear wheels about seven inches in diameter which meshed together, the one being attached to the line shaft and the other to the roller. The rollers could be started and stopped, made to run forward or backwards by means of a lever which was within the reach of, and operated by, the person who acted as offbearer. The prevailing motion of the rollers was away from the saw, and when running in that direction the gear wheels meshed from the under side. From the floor to the point where the wheels meshed was between eight and nine inches. The only covering provided for the gearing was an iron hood which covered the top and a distance of half-way down the side, leaving the bottom wholly unprotected.

At the time of his injury the respondent was acting as offbearer immediately behind the main saw. It was his duty to keep the timber products passing through the saw straight upon the rollers so that they would be conveyed to their destination in other parts of the mill. To enable him better to perform his work he was furnished with a picaroon, an instrument in the form of a single pointed pick, having the point sharpened so as to be easily stuck into the wood. The accident happened on the morning of May 20, 1905, shortly after the mill started. A large slab was cut from a log and fell upon the rollers. The appellant stuck the picaroon into it, and was following it down the rollers when the leg of his trousers caught in a pair of the gear wheels mentioned, drawing his leg between the cogs, and causing the injury for

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which he sues. At the trial the jury returned a verdict in his favor, and this appeal is from the judgment entered thereon.

It is first contended that the evidence was insufficient to justify the verdict. The contention is founded on the claim that the evidence shows that the guard supplied by the appellant for this gearing was one in common use in lumber mills of like character; that it had been long in use in this particular mill and had, theretofore, proven sufficient; that the accident was an unusual one, not to be anticipated by ordinary careful and prudent millowners and operators; and that the appellant had made a careful and judicious effort to comply with the factory act, which requires gearing of the character causing the respondent's injury to be guarded. And from this it is argued that the respondent must be held to have assumed the risk of injury from the gearing, as he knew, or by the exercise of ordinary prudence should have known, of its condition. But we think the appellant had overstated the effect of its evidence. While there was evidence to the effect that guards of the character here employed were in common use, some of the appellant's own witnesses intimated, if they did not so directly testify, that this form of guard was not used originally for the purpose of protecting the employees against accident, but rather to guard against the accumulation of refuse on top of the gearing which, without some such protection, would catch in the cogs and stop the operation of the rollers on their being reversed. Others again testified openly, what must manifestly be the case, that the guard, since it covered only the upper portion of the gearing, was no protection against a contact with the lower part. Whether, therefore, the gearing was properly guarded was, from the appellant's standpoint, at best a debatable question, and being such was for the jury.

The appellant requested a number of instructions, the fourth and fifth of which were as follows:

"You are further instructed that if you find from the evidence in this case, by a fair preponderance, that the de-

fendant, Larson Lumber Co., had in good faith attempted to provide a proper safeguard and protection for the cogs and gear with which, and in connection with which, the plaintiff under his employment was required to work, that the condition of such cogs and gear was equally open and apparent to plaintiff and the defendant and that the plaintiff under these circumstances continued in his employment and was injured by coming in contact with said gear, the plaintiff under the law, assumed the risk of such injury, and cannot recover and your verdict should be for the defendant.

"You are further instructed that if you find from the evidence by a fair preponderance thereof, that the defendant had made an intelligent, careful, judicious and honest effort to provide a proper guard and if you further find the plaintiff had ample opportunity for seeing, knowing, and learning whether the guard so furnished was proper and with such opportunities continued to work, in that event he must be held to have assumed the risk of his employment including the sufficiency of such guard, and if you so find it will be your duty to return a verdict for the defendant."

The court declined to give the requested instructions, but gave the following:

"You are further instructed that the statute referred to does not provide for, as already stated to you, or define any particular kind or character of guard to be provided and maintained by an employer, but requires him to provide a proper guard, and, even though it should be shown that it was possible to have provided a guard which would have prevented the injury complained of, such fact is not in itself proof of failure to comply with the law in furnishing a proper guard, and the question for you to determine is whether or not the defendant in this case, under all of the evidence, had provided and was maintaining at the time of the alleged accident, a guard sufficient to protect the plaintiff against such dangers as reasonably intelligent and experienced millmen or operators would have anticipated."

The instruction given was as favorable to the appellant as the law of the case warranted. While the language used by this court in *Johnson v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627, might seemingly justify the requested instruc-

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tion, it was not intended in that case to announce the rule that the degree of care required of millowners and operators in providing guards for machinery under the factory act was less than ordinary care. The millowner in this, as in the performance of his other duties towards his employees, must exercise that degree of care which reasonably prudent and cautious persons exercise under similar circumstances and conditions. The court's instruction embodied this idea and was therefore sufficient. The other requested instructions were sufficiently covered by the instructions given.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

ROOT, J. (dissenting)—I dissent. I not only think requested instruction numbered 5 was in accordance with *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627, and other cases heretofore decided by this court, but I believe it to be clearly right as an original proposition. It was applicable to the case and should have been given—or some instruction covering the same proposition should have been. This was not done. The instruction given in lieu thereof does not cover the same question. The direction contained in the latter part of the instruction given the jury conflicts with the preceding portion of the instruction, and is entirely at variance with the plain language of the statute. Conflicting, one portion with another, it was necessarily confusing to the jury. Being confusing, and a material portion being inconsistent with the statute, it was erroneous and prejudicial. The statute requires a “reasonable” guard where it is “practical to guard” and where the machine and appliances “can be effectively guarded with due regard to the ordinary use of such machinery and appliances.” The instruction given contains none of these limitations. Under that instruction, it is not sufficient for the guard to be “reasonable,” “practical,” and the appliance “effectively guarded with due regard to the ordinary use of the machinery and appliance.” This in-

struction requires that it must be "a guard *sufficient to protect* the plaintiff against such dangers as reasonably intelligent and experienced millmen or operators would have anticipated." In other words, the millowner is made an absolute insurer against any and all such anticipated dangers, no matter how inherently dangerous the machine or appliance is, and without that "due regard to the ordinary use" which the statute plainly mentions. The nature and use of many machines are such that it is absolutely impossible to safeguard them so as to protect an operative from dangers reasonably to be anticipated. He and everybody else knows this. The statute recognizes this fact and contains limitations accordingly. The instruction complained of ignores both the fact and the statute.

Crow, J., concurs with Root, J.

[No. 6603. Decided April 10, 1907.]

FRANCIS H. COOK *et al.*, Respondents, v. H. D. SKINNER,
Appellant.¹

APPEAL—REVIEW—SCOPE. Questions going to the merits of the case cannot be considered on appeal from an order granting a new trial.

SAME—DISCRETION—NEW TRIAL. An order granting a new trial on the ground of newly discovered evidence will not be disturbed on appeal except for abuse of discretion.

Appeal from an order of the superior court for Spokane county, Poindexter, J., entered September 1, 1906, granting a new trial, after a trial on the merits and the verdict of a jury rendered in favor of the defendant, in an action for fraud. Affirmed.

A. E. Barnes and George A. Latimer, for appellant.
Belt & Powell, for respondents.

¹Reported in 89 Pac. 553.

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Opinion Per MOUNT, J.

MOUNT, J.—This appeal is taken from an order granting a new trial upon the motion of the plaintiffs. Defendant appeals.

The action was brought to recover from the defendant a certain tract of land in Spokane county, upon the alleged ground that the defendant acquired the land from plaintiffs by fraud. Issues were joined and a trial was had before the court and a jury. A verdict was returned in favor of the defendant. Thereupon the plaintiffs filed a motion for new trial, upon the following grounds: “(1) Irregularity in the proceeding to the court and jury, by which plaintiffs were prevented from having a fair trial; (2) misconduct of the prevailing party and jury; (3) accident and surprise which ordinary prudence could not have guarded against; (4) newly discovered evidence material to the party making the application, which could not by reasonable diligence have been discovered and produced at the trial; (5) insufficiency of the evidence to justify the verdict, and that it is against law; (6) error in law occurring at the trial and excepted to at the time by the party making the application, to wit the plaintiff.” The motion was supported by affidavits, and at the hearing upon the motion, the court granted a new trial by a general order without specifying any reason therefor.

The appellant in his brief presents several questions which go to the merits of the case. For example, he contends that the complaint is insufficient, and that the court should have entered a judgment in favor of appellant upon the evidence. These questions are not properly before us now, because no final judgment has yet been rendered in the cause. Such questions will be considered only upon final judgment. The order granting the new trial is interlocutory, but is made appealable by statute. Upon an appeal from such an order, it is proper to consider only the question whether the court erred in making that particular order. *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176. The order granting a new trial was a general order. It may have been based upon any one

of the grounds stated in the motion. We think there was sufficient in the showing of newly discovered evidence to justify the order. There was certainly much conflict in the evidence, and the court may have granted the motion upon this ground alone, in his discretion. We will not review such discretion except for abuse, and abuse does not affirmatively appear in this case. The rule in this class of cases is stated, and the authorities cited, in *Colvin v. Northern Pac. R. Co.*, 42 Wash. 5, 84 Pac. 616.

For the reasons there stated, the order is affirmed.

HADLEY, C. J., DUNBAR, ROOT, CROW, and FULLERTON, JJ., concur.

[No. 6367. Decided April 10, 1907.]

P. C. KAUFFMAN, *Respondent*, v. ALEXANDER BAILLIE *et al.*,
as Executors of the Estate of Robert Wingate,
*Deceased, et al., Appellants.*¹

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. A plaintiff claiming under a contract with a person since deceased may testify as to transactions between himself and a third person and as to services performed by him which appear to be the consideration for the contract, and the same does not fall within the statute prohibiting testimony of a transaction had with, or statements made to or by, a deceased person.

CONTRACTS—DELIVERY—EXECUTION—EVIDENCE—SUFFICIENCY. In an action upon a contract signed by and in the handwriting of a person since deceased, the contract is admissible in evidence where it shows on its face that it was for the benefit of plaintiff who had had possession of it for a long time and ever since its date, execution and delivery being presumed from such facts.

BROKERS—CONTRACT FOR PROFITS—TIME FOR PERFORMANCE. Where lots are purchased for speculation, the vendee agreeing to pay a broker one-third of the net profits when the lots are sold, a reason-

¹Reported in 89 Pac. 548.

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Opinion Per CROW, J.

able time for sale is intended, and upon death of the vendee and repudiation of the contract by his executor, the broker may recover of the estate one-third of the net value of the land after deducting all expenses.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered June 9, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to establish and enforce an interest in real property. Affirmed.

Fogg & Fogg, for appellants.

Ellis & Fletcher, for respondent.

Crow, J.—Robert Wingate died on March 2, 1905. About December 1, 1900, contemplating the purchase of certain lots in the city of Tacoma, then owned by one Charles K. Zug, he executed the following instrument:

“Office Robert Wingate.

“Tacoma, Washington, Decr. 1st, 1900.

“Know all men by these presents that I Robert Wingate of Tacoma Washington so soon as I acquire title from Charles K. Zug of Philadelphia for Lots 7, 8, 9, 10, 11 & 12 inclusive in Block 2100 Tacoma Land Co's 1st Addition to Tacoma, Wash., which I expect to do before January 1901. Then and in that event I agree to pay to P. C. Kauffman personally one-third (1-3) of the profits arising from sale of above described lots when I sell the same, said profits will be arrived at by deducting price paid for lots together with interest computed at 8 per ct. per annum on money invested between time of purchase and time of sale. P. C. Kauffman is not interested in purchase, but will participate to the extent of one-third in net profit arising from sale, when sold, the basis for this agreement is upon presumption that I acquire title to lots above described. Robert Wingate.”

About December 19, 1900, Mr. Wingate received a deed for the lots and the title has since been in him or his estate. P. C. Kauffman, the plaintiff, asserting an interest in the lots, presented a claim to Wingate's estate, which was re-

jected by his executors. Thereupon he as plaintiff brought this action against the defendants, as the executor, heirs at law, and legatees of Robert Wingate, deceased, to establish and enforce his alleged interest.

On the trial, it was admitted that the instrument above set forth and then produced by Mr. Kauffman was in the handwriting of the decedent and signed by him; that an envelope in which it was inclosed was addressed to Mr. Kauffman, also in the decedent's handwriting; that Mr. Wingate had received from Mr. Zug a deed for the lots, dated December 19, 1900, reciting a consideration of \$5,800; that this deed, which at the trial was produced by the defendants, had been recorded, and that Robert Wingate had kept an itemized account with the lots, charging to them all disbursements for purchase money, taxes, interest, etc., and crediting them with a small amount of ground rents received. The written instrument, envelope, and deed were admitted in evidence over the defendants' objections. One Berry, a business man of Tacoma, testified that, about October, 1903, Robert Wingate told him he wanted to sell the lots, as he wished "to get settled up with an interested party up in the bank"; that this conversation took place in the presence of Wingate's daughter, on Pacific avenue, at a point from which the Fidelity bank was up the hill; that no other bank was up the hill from that point; that the plaintiff Kauffman was an officer of the Fidelity bank, and employed therein, and that Berry understood Wingate to refer to some one in that bank, although no name was mentioned. Evidence was also admitted to show the value of the lots. The plaintiff, Kauffman, over strenuous objections of the defendants, was permitted to testify that the written instrument and envelope above mentioned had been in his possession at all times since December 1, 1900; that immediately after they came into his possession he conducted negotiations with Mr. Zug for the purchase of the lots for Mr. Wingate; that he sent numerous letters and telegrams to Zug, and made a trip to Philadelphia, Pennsyl-

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vania, Mr. Zug's home, to see him personally; that he finally succeeded in getting the purchase price fixed at \$5,800; that a deed was executed by Zug, conveying the lots to Wingate, being the deed produced at the trial by the defendants; that Zug was Kauffman's first cousin; that their relations were very close and intimate, and that Kauffman therefore had a better chance than any other person to secure the property. In answer to a question propounded by defendants' counsel, Mr. Kauffman, on cross-examination, further stated that the written instrument and envelope were delivered to him by Mr. Wingate. To this statement the defendants at the time objected, and moved that it be stricken.

The theory of this action is that, in consideration of Kauffman's contemplated services in securing and purchasing the lots, Mr. Wingate had executed and delivered to him the written instrument above set forth, and that he, as an agreed compensation for his services, is entitled to one-third of the net value of the lots, after deducting the original purchase price, together with other disbursements such as taxes and interest. The trial court made findings in favor of Kauffman, estimating his interest on this basis at \$9,913.70. From a money judgment in his favor for that amount, the defendants have appealed.

The appellants do not object to the form of the judgment. The parties consented that, if the respondent had any interest, it might be ascertained, and judgment entered for its cash value. The appellants, however, insist that the respondent has no interest, and that he is not entitled to any relief, either legal or equitable.

The appellants contend that the trial court erred in overruling their objection to the testimony of the respondent, Kauffman, which they insist was inadmissible, he being disqualified under Bal. Code, § 5991 (P. C. § 937), reading as follows:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the

action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: *Provided, however,* That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years. . . ."

Except as to Kauffman's statement, made on cross-examination, that the agreement and envelope were delivered to him by Mr. Wingate, which we will not consider, the appellants are mistaken when they insist that he testified to any transaction had by him with, or any statement made to him by, the decedent. He was cautioned by his attorney to eliminate from his testimony any conversations or transactions with Mr. Wingate, and carefully observed their admonition. The statute does not disqualify him from being a witness. It only prohibits him from telling of any transactions had by him with, or any statements made to him by, the decedent. His testimony was only as to transactions between himself and Mr. Zug, a third party, all of which occurred in the absence of the decedent, and was offered to show the services performed by respondent in securing and purchasing the property. Mr. Wingate, if living, could not testify as to these transactions, nor would he be in any position to deny a single statement made by the respondent, having no personal knowledge thereof. With the exception of the one statement made on cross-examination, all of respondent's evidence was admissible. *Al How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Belden v. Scott*, 65 Wis. 425, 27 N. W. 356.

The case of *Marvin v. Yates* bears a marked resemblance to this, the principal difference being that an oral contract

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was there relied upon, not being evidenced by any written instrument. The plaintiff, Marvin, was permitted to testify to acts done and services performed by him in the course of his employment, but in the absence of the deceased. In passing upon his competency and the admissibility of his evidence, this court said:

"It is assigned as error that the court permitted respondent to testify in violation of the statutory rule prohibiting a claimant from testifying concerning transactions had by him with, or statements made to him by, the deceased person. We think the court did not permit a transgression of the rule. Respondent was instructed by counsel to exclude from his answers anything concerning personal transactions with Woodward, or any conversations between them about such transactions. This, we think, respondent did. He testified that he looked at certain lots when he was alone, stating the time when he saw them, their value, and that deeds were afterward made for the property; but he did not say anything at all about the conversations or transactions between himself and Woodward. Considering the difficulties attending the proofs in this class of cases, and the usual temptation to transgress upon the statute, we think the respondent kept well within the rule as interpreted by this court in *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639."

In *Ah How v. Furth*, *supra*, the contract of employment having been proven, the plaintiff was permitted to detail the work he had done and the services he had performed in the course of his employment, eliminating from his testimony all personal transactions and communications between himself and the deceased. Referring to his evidence, this court said:

"The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him, was not testimony in relation to a 'transaction had by him with, or any statement made to him by,' such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent."

The appellants cite and rely upon the cases of *Spencer v. Terrel*, 17 Wash. 514, 50 Pac. 468; *Kline v. Stein*, 30 Wash.

189, 70 Pac. 235, and *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553, decided by this court, all of which can be easily distinguished. In *Spencer v. Terrel*, there was no evidence whatever of the trust alleged by the plaintiff. Here there is documentary evidence in the handwriting of the decedent, corroborated by his statement, to the witness Berry, which is not contradicted by the decedent's daughter, who was present. In *Kline v. Stein*, proof of the purchase of the land by plaintiff rested entirely on his evidence of transactions between himself and the decedent. In *Bay View Brewing Co. v. Grubb*, the evidence was excluded for the reason that the member of a partnership, with whom the witness had the transaction in issue, was dead and the surviving partner had no personal knowledge thereof.

The deed from Zug to Wingate was properly admitted in evidence. The execution of the written agreement, and the receipt of the deed by Wingate, were both admitted by the answer. The appellants offered no evidence except on the value of the lots. As to all other issues they submitted their case on the evidence admitted on behalf of the respondent. They claim title under the Zug deed, and we fail to understand how Mr. Wingate, if alive, could, in the face of these admissions, deny the deed or its recitals.

The written instrument conceded to be in Wingate's handwriting was properly admitted. It tended to show the agreement of Wingate, and the interest of the respondent. Appellants contend that its delivery to Kauffman has not been shown by competent evidence. On that issue the undisputed facts raise a presumption of delivery sufficient to constitute a *prima facie* case in favor of the respondent. The instrument was written and signed by the decedent. It shows on its face that Kauffman is the person for whose benefit it was drawn. He was the only person to whom, in the course of business, it would ordinarily have been delivered. It had been in his possession for a long period of time, in fact since about the date of its execution. He produced it at the trial. No

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fact or circumstance tending to question the validity or good faith of his possession has been shown. His possession was evidence of ownership. Under the circumstances it will be presumed that the instrument was executed and delivered to Kauffman on December 1, 1900, the date it bears. *Wigmore*, Evidence, § 157, subd. 2; *Jones*, Evidence, §§ 44 and 45; *Devlin*, Deeds, §§ 178, 294, 295; *Rohr v. Alexander*, 57 Kan. 381, 46 Pac. 699; *People v. Snyder*, 41 N. Y. 397; *Reed v. Douthit*, 62 Ill. 348; *Leonard v. Fleming* (N. D.), 102 N. W. 308.

Appellants call attention to the words, "I agree to pay to P. C. Kauffman personally one-third of the profits arising from the sale of the above-described lots when I sell the same," and insist that Kauffman cannot recover as no sale has been made. The contract on its face shows that the lots were to be purchased for sale. In other words, they were a speculation, and were only held for an advance. It was intended that, when a sale was made, Kauffman should receive his interest which could be easily ascertained. In such a contract, when no exact time for performance is fixed, a reasonable time is intended. Wingate died before sale was made. The property has multiplied many times in value. The appellants have denied respondent's interest. They also refuse to sell, and may continue to do so indefinitely, although a handsome profit can now be realized. If their construction of the agreement in this regard be correct, the only course necessary for them to pursue to eliminate respondent's interest altogether will be to hold the property indefinitely, and to continue refusing to sell. Any such construction does violence to the evident spirit and intent of the agreement, which cannot be misunderstood. Wingate is now dead, and the respondent is compelled to enforce his rights or lose them entirely. He is now asserting them in the only manner available to him, and the appellants, although contesting his interest, consent that the same, if sustained by the court, may be awarded to him in cash. In the light of the facts disclosed

by the record, their contention that he is not entitled to recover in the absence of a sale cannot be sustained. *Noyes v. Barnard*, 63 Fed. 782.

After a careful examination of all the evidence, we conclude that the findings made by the trial court are sustained by its clear preponderance. The contract is in existence and speaks for itself. The respondent has performed the services detailed by him. The evidence of Berry, a disinterested party, is undisputed. The deceased kept a distinct account with these lots, which he must have done in view of Kauffman's interest. The findings support the final judgment. The trial court has committed no prejudicial error. The judgment is affirmed.

HADLEY, C. J., DUNBAR, MOUNT, and ROOT, JJ., concur.

[No. 6590. Decided April 12, 1907.]

A. B. STEWART *et al.*, *Respondents*, v. YESLER ESTATE, Incorporated, *Appellant*.¹

SPECIFIC PERFORMANCE — LACHES — EVIDENCE—SUFFICIENCY. Specific performance of a contract for an interest in lands will be denied on account of inexcusable laches, where the plaintiff and associates, in 1888, agreed to advance the cost of clearing, platting, and selling the land and paying the taxes thereon, the plaintiff to have a one-sixth interest on the returns from sales, after paying a stated sum to the owner and repayment of disbursements, but plaintiff and his associates failed to perform any part of the agreement during a long period of financial depression, allowing the lands to be sold to the defendant for taxes, in the interest of creditors of the estate of the owner, who carried the same, and where plaintiff only commenced action in 1905, when the land had increased tenfold in value, four years after notice that defendant denied his interest in the property.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 19, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before

¹Reported in 89 Pac. 705.

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the court without a jury, in an action for the specific performance of a trust agreement. Reversed.

Harold Preston and Hughes, McMicken, Dovell & Ramsey,
for appellant.

Charles F. Munday and Peters & Powell, for respondents.

Crow, J.—Action by A. B. Stewart and wife against the Yesler Estate, Incorporated, to enforce specific performance of an alleged trust. The following facts are undisputed: Early in 1888, Henry Yesler, owning twenty acres of unplatted land in Seattle, and block 1 (containing twenty-four lots) in Sarah B. Yesler's First Addition to Seattle, entered into a written agreement, as first party, with L. S. J. Hunt, J. F. McNaught, J. D. Lowman, and A. B. Stewart, as second parties, stipulating that upon their request he would plat the twenty acres and sell the same and block 1 to purchasers procured by them, at not less than \$500 per acre for the twenty acres, and \$225 per lot for block 1; that all disbursements for platting, clearing, grading and improving and all taxes were to be advanced by the second parties; that Yesler was to first receive \$15,400, of the proceeds of sales made; that the second parties were then to be reimbursed for their advancements, and that the remainder was to be paid, one-third to Yesler and one-sixth to each of the second parties. This agreement was destroyed in the great Seattle fire in 1889.

Henry Yesler died December 16, 1892. On December 15, 1892, he being then alive but on his death bed, J. D. Lowman, acting as Yesler's attorney in fact, under a power of attorney held by him, executed and delivered to Jacob Furth a deed for the real estate above mentioned. On December 16, 1892, but after Yesler's death, Furth executed and delivered the following instrument:

"Whereas Henry L. Yesler, by the hand of James D. Lowman, his attorney in fact, did, on the 15th day of December,

1892, convey to me, Jacob Furth, these certain premises situated in the County of King, State of Washington, and particularly described as follows, to wit: [Here follows description.] And whereas said conveyance was made to me upon certain confidences and trusts (I myself having no interest in the said lands, and taking nothing for myself by the said conveyances), to wit: I am to plat the said twenty acres whenever requested so to do by L. S. J. Hunt, A. B. Stewart, Joseph F. McNaught and J. D. Lowman, and to sell to such purchasers as they or either of them may procure therefor, at such prices as they may dictate: *Provided, however,* That no lot in said block one (1) may be sold for less than \$225.00 per lot, nor any part of the said twenty (20) acres at a less rate than \$500.00 per acre. All expenses for the clearing, platting, grading or any improving of said property or any part thereof is to be paid and advanced by them, the said Hunt, Stewart, McNaught and Lowman, who are also to pay all taxes, city and county upon said property and the whole thereof, . . . I am to receive all moneys paid by purchasers for lots or parts of said lands, and am to pay all of the same to Henry L. Yesler, his heirs, executors, administrators or assigns, until he, the said Henry L. Yesler; shall have been paid the sum of \$15,400.00. After the said sum of \$15,400.00 shall have been paid to the said Henry L. Yesler, his heirs, executors, administrators or assigns, I am, out of any further moneys received from such sales, to repay any and all advancements made by the said Hunt, Stewart, McNaught and Lowman, or either of them, for clearing, platting, grading or otherwise improving the said lots or lands or in paying the taxes thereon. After the said payment of \$15,400.00 shall have been made to the said Henry L. Yesler, his heirs, executors, administrators or assigns, and after said advancements, if any, have, as above provided, been paid the said Hunt, Stewart, McNaught and Lowman, or either of them, I am to divide all further moneys received by me from such sales, into five parts, as follows, to wit: . . . ”

The agreement then provides for the payment of one-third of the residue to Yesler and one-sixth each to Hunt, McNaught, Lowman and Stewart. In November, 1894, a

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supplementary declaration of trust was executed, reading as follows:

"This indenture entered into this —— day of November, A. D. 1894 between Jacob Furth of the first part, and L. S. J. Hunt and Jessie N. Hunt, his wife, A. B. Stewart and May Stewart, his wife, Joseph F. McNaught and Jennie E. McNaught, his wife, J. D. Lowman and Mary R. Lowman, his wife, of the other part, Witnesseth: That, whereas, by deed bearing date December 15th, 1892, Henry L. Yesler did convey to the party of the first part [here follows description of land above mentioned.] And whereas, the said conveyance was made to me in trust upon the confidences and trusts embraced and expressed in a certain declaration of trust executed by the party of the first part under his hand and seal on the 16th day of December, 1892, which declaration of trust was delivered to L. S. J. Hunt, A. B. Stewart, Joseph McNaught, J. D. Lowman and Henry L. Yesler on the day of its date; and which declaration of trust is hereto attached and made a part hereof. And whereas, Henry L. Yesler, J. D. Lowman, J. F. McNaught and L. S. J. Hunt did on the 10th day of January, 1892, make and deliver to The James Street Construction Company their promissory note for the sum of twenty-five hundred dollars (\$2,500) with interest thereon from June 16th, 1891, until paid at the rate of eight per cent per annum, and on the 10th day of July, 1892, did make and deliver to the said payee their other promissory note of twenty-five hundred dollars (\$2,500) bearing date July 10th, 1892, payable one year after date with interest from June 16th, 1892, until paid at the rate of eight per cent per annum, which said promissory notes are now held by M. H. Young, and have been presented to the administrators of the estate of Henry L. Yesler, deceased, as a claim against the said estate. And whereas, said notes were given by the makers, thereof as a subsidy to the James Street Construction Company, for the Broadway branch of the Union Trunk line. And, whereas, since the execution of said deed and declaration of trust, the north half of said block one (1) has been sold for the sum of four thousand dollars (\$4,000.00) and said sum paid to the estate of Henry L. Yesler upon the payment of fifteen thousand four hundred dollars (\$15,400.00) due him under said declaration of trust;

"And, whereas, it was agreed between the makers of said notes at the time of their execution, that the makers of said notes as between themselves should be liable as follows: Henry L. Yesler, one-third (1-3) thereof, J. D. Lowman, two-ninths (2-9) thereof, Joseph F. McNaught, two-ninths (2-9) thereof, L. S. J. Hunt, two-ninths (2-9) thereof, and that each should be surety for the others for their payment of their share of said notes; and further, that the said notes should be paid out of the proceeds of the property so as aforesaid conveyed, as follows: 1st. Henry L. Yesler should be paid in full his fifteen thousand and four hundred dollars (\$15,400.00) as in said declaration of trust provided. 2nd. A. B. Stewart, should be paid one-sixth (1-6) of the net balance, as in said declaration of trust provided (any advancement or advancements made by either party in the interest to be first deducted.) 3rd. The net balance of such proceeds after deducting the said payment to Henry L. Yesler of \$15,400.00 and the said payment to A. B. Stewart, of his one-sixth (1-6) as above provided, and after the payment of advances made as provided in said declaration of trust, was to be applied, first to the payment of said notes or of the amount thereof to any maker or makers thereof who should in the meantime have been compelled to pay the said notes, and after that the balance remaining to be divided into five (5) parts to be paid as follows: One-third (1-3) to Henry L. Yesler; two-ninths (2-9) to L. S. J. Hunt; two-ninths (2-9) to Joseph F. McNaught, and two-ninths (2-9) to J. D. Lowman; And whereas, in preparing the said declaration of trust the fact that said notes were outstanding was overlooked, and therefore it was neglected to provide for them in said declaration of trust;

"Now, therefore the said declaration of trust is modified as hereinafore said so as to express the true understanding and agreement of the parties as above stated, and that the parties in interest do hereby agree to such modification."

This instrument was executed by all the parties thereto, including the plaintiff Stewart.

At no time prior to the commencement of this action did Stewart or his associates clear, plat, grade, or improve the land or pay taxes. The taxes became delinquent and certificates of delinquency were issued. Between 1892 and 1898,

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a period of general financial depression prevailed in this state. Jacob Furth and Minnie G. Yesler were appointed administrator and administratrix of Yesler's estate, which was heavily involved. In 1898 they sold all his realty including that above mentioned, under order of the probate court. The unsecured creditors selected one Rolland B. Denny to purchase the property. He made the purchase on June 27, 1898, holding in trust for such creditors, and thereafter the defendant corporation, the Yesler Estate, Incorporated, being formed, he, at the creditor's request, conveyed all the real estate to it, receiving its capital stock in payment. This stock was distributed to the creditors. The Stewart & Holmes Drug Company, being a creditor, its stock was received by A. B. Stewart as its president. The subsidy notes were presented as claims against the estate of Henry Yesler, and their holder having received stock transferred them to the Yesler Estate, Incorporated, which, in October, 1898, entered into agreements with Hunt, McNaught and Lowman, releasing them from liability under the trust agreement, and the notes. Thereupon Hunt and Lowman released to the defendant their interest in the real estate. As numerous judgments stood against McNaught, the defendant, with his consent, foreclosed against him and purchased his interest at sheriff's sale. These steps were taken to remove any possible cloud on defendant's title, and immediately thereafter it redeemed the property from the delinquent tax sales, disbursing \$4,000 therefor. It has paid further taxes and assessments sufficient to make a total of \$13,517.40.

On December 9, 1901, Mr. Furth wrote Stewart that the defendant, claiming Stewart had no interest in the property, had demanded a deed from Furth, and stated that he would delay action for fifteen days until Stewart could consider his course of procedure. On December 11, 1901, Stewart wrote Furth, claiming a one-sixth interest in the real estate, and stated that he was ready and willing to pay one-sixth of the taxes, upon being furnished a statement. About the same

time he made a like offer to the defendant. On December 24, 1901, the defendant wrote Stewart denying his claim, giving a detailed statement of the situation as understood by it, and closed by saying: "We do not understand that you have any interest in this property." On December 31, 1901, Mr. Furth wrote Stewart that he would convey the property, and shortly thereafter did so by a quitclaim deed to the defendant. From that time until the commencement of this action in December, 1905, the plaintiff took no further action, and the record shows that from the date of the original agreement with Yesler in 1888 nothing was done by Stewart or any of his associates towards the performance of the contract, except that McNaught, prior to Yesler's death, contracted to purchase the south half of block 1, which was afterwards conveyed to one Geo. F. Gund, and that Stewart, in December, 1901, said he was willing to pay one-sixth of the taxes. After 1901 Seattle's growth caused public improvements, such as streets, sewers, etc., to become necessary, for which the defendant disbursed \$12,500 more. By December, 1905, the property had increased tenfold in value, five to eightfold thereof after December, 1901.

The defendant in its answer pleaded laches, estoppel, and other defenses. The trial court made findings in substantial accordance with the above statement. Thereupon the plaintiff paid into court a tender of \$5,612.69, and a decree was entered, awarding him specific performance, and appointing a trustee to plat and sell the land and distribute the proceeds, as follows: (1) To the defendant \$11,400; (2) to the payment of taxes and other charges; and (3) one-sixth of the remainder to the plaintiff, and five-sixths to the defendant. The defendant has appealed.

The only defense which we will consider is that of laches. The respondent comes into a court of equity demanding specific performance of the trust agreement. He claims a one-sixth interest in the profits, admitting his liability for taxes and other disbursements. The first question presented

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is whether he has done equity. He has paid into court one-sixth of the disbursements and taxes with interest, and now stands ready to receive large and immediate profits. But is that doing equity? Has he exhibited at all times a readiness to perform his part of the agreement? If not, has he shown any reasonable excuse for failing to do so? Has his diligence been such as to commend him to the conscience of the chancellor and entitle him to equitable relief or has he been guilty of inexcusable neglect, inactivity and laches, such as will deprive him thereof? In his complaint, without explaining or excusing his delay, he basis his right to recover upon the declaration of trust executed by Jacob Furth, making no reference to the original agreement executed by Henry Yesler in 1888, which originated the trust. Henry Yesler lived four years thereafter. During his lifetime nothing was done by the respondent or his associates, except that McNaught contracted to purchase the south half of block 1, afterwards conveyed to Gund. They did not plat, clear, grade, or improve, nor did they pay taxes.

After Henry Yesler's death, the real estate was sold and, by mesne conveyances, passed to the appellant. It redeemed the property from tax sale, preventing its complete and irrevocable loss. During this time, if the trust agreement was valid and had not been abandoned by the respondent, it was the duty of himself and associates to advance all these taxes and pay for clearing, grading and improvements, but not one dollar did they expend. They did nothing. A period of financial depression ensued and continued for a number of years. The estate of Henry Yesler, its creditors, and the Yesler Estate, Incorporated, severally struggled to save the property from total loss, carrying all financial burdens thereby imposed, but the respondent still remained inactive. In 1898 his associates abandoned and surrendered their interests. Respondent made no formal surrender, yet in view of existing conditions, the depreciation in values, and the unsalable character of the property, it is impossible to conceive

that he did not abandon the trust. It is evident that neither he nor his associates were willing to advance funds for taxes and improvements upon a losing proposition. For nine years after Yesler's death, and for three years after Hunt, McNaught and Lowman had surrendered their interests, the respondents remained inactive, until December, 1901, when, being advised that the appellant was demanding a quitclaim deed, and was insisting that he had no equitable rights, he for the first time expressed a willingness to pay taxes, and claimed an interest. The property had then appreciated in value, but not sufficiently to insure so handsome a profit as it will now yield. Respondent might have ascertained from the county and city officials the taxes and assessments then paid, and might have made an actual tender of his proportion therefor. This he failed to do, contenting himself with a mere expression of willingness to pay. In December, 1901, he was notified that the appellant denied any interest in him. Why, if he then intended to assert a *bona fide claim*, which was disputed by appellant, did he not, within a reasonable time, proceed to enforce his alleged rights? Appellant's attitude called for such affirmative action on his part. We are constrained to conclude that the advancement in values had not thus far been such as to promise a sufficient reward for litigation uncertain in its results.

The respondents, after December, 1901, indulged in four additional years of inactivity, then in December, 1905, the property having increased tenfold in value, he instituted this action and, after trial, made his first payment of \$5,612.69, at a time when he could realize a large and immediate profit, approximately estimated at \$25,000. Should he, after all these years of inactivity, be permitted by a court of equity to realize this large return from property saved and improved by the appellant without assistance from him or his associates? We think not. The facts here constitute a much stronger showing of laches than was presented in *Ferrell v.*

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Lord, 43 Wash. 667, 86 Pac. 1060, recently decided by this court. In that case we said:

"There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defense to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed."

See, also, *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

This action for specific performance was commenced by the respondent after long and unexplained delay, and at a time when the property had increased tenfold in value. Unreasonable delay of a party in performance, or in enforcing his rights when disputed, may shorten the period fixed by the statute of limitations and constitute such laches as will amount to an abandonment of the contract on his part and deprive him of the remedy of specific performance.

"It is indeed generally essential that the party seeking a specific performance should not himself have been backward; that he should not have held off *until circumstances may have changed*, or kept himself aloof so as to enforce or to abandon the contract as events might prove most advantageous." *Ford v. Euker*, 86 Va. 75, 9 S. E. 500.

The plaintiff in *McCabe v. Matthews*, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 256, had remained inactive for some nine years, until the land advanced in value from \$150 to \$7,500. He then sued for specific performance. Mr. Justice Brewer, in closing his opinion, said:

"It seems to us to be a case of a purely speculative contract on the part of the plaintiff; doing nothing himself, he waits

many years to see what the outcome of the purchase by defendant shall be. If such purchase proves a profitable investment, he will demand his share; if unprofitable, he will let it alone. Under those circumstances the long delay is such laches as forbids a court of equity to interfere."

See, also, Fry, *Specific Performance* (3d ed.), § 1072: *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145; *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35; *Fowler v. Marshall*, 29 Kan. 665.

Further comment and authority are unnecessary. Equity and good conscience will not permit any relief to the respondent in the face of his laches and long-continued neglect. Were he to recover, there would be no limit to the prosecution of stale claims in violation of the present well-established doctrine of laches as universally announced.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., DUNBAR, and MOUNT, JJ., concur.

[No. 6529. Decided April 15, 1907.]

W. W. WHIPPLE, *Respondent*, v. D. H. LEE, *Appellant*.¹

VENDOR AND PURCHASER—CONTRACTS—BROKERS—INTEREST IN PROPERTY. A contract reciting that the owner of land agreed to sell the same to plaintiffs at \$150 per acre, the plaintiffs agreeing to plat and sell the land and pay all expenses and taxes, and from the proceeds of sales pay the owner \$150 per acre, is not a brokerage contract that can be forfeited by the owner, but conveys an interest in the lands.

RECEIVERS—APPOINTMENT—PARTNERSHIP. A receiver is properly appointed at the suit of a partner where his copartner, conspiring with others, wrongfully excludes the plaintiff from participating in the partnership business.

Appeal from an order of the superior court for King county, Griffin, J., entered June 2, 1906, appointing a receiver. Affirmed.

¹Reported in 89 Pac. 712.

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J. M. Hammond and Blaine, Tucker & Hyland, for appellant.

Holcomb & Kirkpatrick, for respondent.

CROW, J.—This action was commenced by the plaintiff, W. W. Whipple, against the American Investment and Improvement Company, a corporation, D. H. Lee, its president, M. C. Robbins, its vice president and assistant secretary, R. H. Lee, its secretary, D. H. Lee individually, and Van de Vanter-Davis Company, a corporation, defendants, for the appointment of a receiver to take charge of certain realty, partnership interests, and other property. From an order appointing a receiver, the defendant D. H. Lee appeals.

The pleadings and statement of facts show that the American Investment & Improvement Company, hereafter called the Company, being the owner of certain unplatted land near the city of Seattle, which was subject to mortgage liens for \$26,500, entered into a written contract on November 20, 1905, with the defendant D. H. Lee and one J. R. Young, whereby it sold to them a portion of said land, and whereby they agreed to plat and sell the same tracts, and pay all proceeds to the investment company until it had received \$150 per acre. The Company agreed that, when Lee & Young had paid \$6,000, it would release one forty-acre tract from the mortgage liens, and that when an additional \$6,000 had been paid, it would release another forty-acre tract. Lee and Young were to pay all taxes, and were entitled to all the proceeds of sales, after making the payments above mentioned. On the same date the appellant, D. H. Lee, and J. R. Young entered into a written contract of partnership, whereby it was agreed that they were to handle, buy, and sell real estate, especially the real estate above mentioned; that Young was to pay \$600 into the firm for its use, which was to be repaid to him; that he was also to loan \$1,000 to D. H. Lee, to be repaid out of Lee's share of the partnership earnings; and that certain other advancements, not exceeding \$4,000, were

to be made by Young, if necessary, towards the discharge of mortgage liens upon the land.

Lee & Young entered upon the immediate performance of their contract, platting the land and offering it for sale. Thereafter, on January 20, 1906, the Company and Lee & Young, as parties of the first part, entered into a written agreement with Van de Vanter-Davis Company, a corporation, party of the second part, granting to it the exclusive right for six months to sell the land in small tracts, on installment contracts, at least twenty-five per cent of purchase money to be paid in cash by the vendees as sales were made. The second party was to receive a commission of ten per cent on all sales, and was to pay to the investment company the surplus of all purchase money as collected, until its \$150 per acre had been paid, as provided by its contract with Lee & Young, and was to thereafter pay all proceeds to Lee & Young. The land was platted and many pieces were sold by the Van de Vanter-Davis Company to different parties, who hold contracts of sale but have not fully paid the purchase money or received deeds.

On April 6, 1906, the respondent, Whipple, for a valuable consideration, purchased the interest of J. R. Young in the partnership of Lee & Young, the firm then becoming Lee & Whipple. On May 5, 1906, the investment company, by resolution and written notice, attempted to cancel its contracts with Lee & Young, and Lee & Whipple, their successors, and refused to further recognize them or concede to them any interest in the land or the proceeds of its sale. About the same date, D. H. Lee also undertook to exclude Whipple from any participation in the firm business, in so far as it grew out of sales of the land, and the agreement with the Van de Vanter-Davis Company. He failed to refund to Whipple, as Young's assignee, any of the funds advanced by Young, or to account for the same, and he has taken and applied proceeds of the business and sales to his own use or to the use of the Company. D. H. Lee is presi-

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dent of the Company, and the only other persons or officers shown to be connected with it are R. H. Lee, D. H. Lee's son, who is secretary, and M. C. Robbins, D. H. Lee's house-keeper, who is vice president and assistant secretary. No affidavits made by R. H. Lee, the secretary, or Robbins, the vice president, were presented on the hearing, nor has their interest in the company, if any, been shown.

From the record it would appear that D. H. Lee has complete control and dictates the policy of the Company, and its officers. He stands in the position, therefore, of procuring the Company to cancel its contract with himself and his partner Whipple, and of doing for the benefit of the Company what would be indirectly for his own benefit. Although a member of the firms of Lee & Young and Lee & Whipple, he now alleges that he has no individual interest in the land or in the contracts above mentioned, the same having been forfeited by the Company. Still he is the only party who has appealed, and he has appealed in his own personal capacity, and not on behalf of the Company or any other party. In other words, he denies that he has any interest in the property, yet he appeals from the order appointing a receiver. The respondent, claiming that he has no appealable interest, has moved to dismiss. While we think this motion one of considerable merit, we will not pass upon it, but decide this case upon the merits, as Lee contends that the receiver has been appointed over the firm which is authorized to, and does, do other business, aside from that arising out of the several land contracts above mentioned, and that he is aggrieved by the order placing the entire firm business in the receiver's control.

The trial court made findings in substantial accordance with the facts above stated. The appellant, D. H. Lee, contends that the contract between the investment company and Lee & Young was a brokerage contract only; that it merely employed them to sell lands of the company for a commission; that it does not convey to them any interest in the land which the company continues to own; and that the company

had a perfect right to forfeit its contract with Lee & Whipple by reason of nonperformance on their part. We cannot agree with these contentions. The contract expressly recites that: "The party of the first part hereby agrees to sell to the parties of the second part, or their assigns, the above-described lands, upon the agreed price of \$150 per acre." The evidence convinces us that the appellant, conspiring with the investment company which he controls, has wrongfully endeavored to exclude the respondent, Whipple, from his interest in the land, and in the partnership firm of Lee & Whipple; that although Lee claims the contrary, the respondent has made no default in the performance of the contracts upon his part, and that this is a proper case for the appointment of a receiver.

The order appointing the receiver is affirmed.

HADLEY, C. J., MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 6511. Decided April 15, 1907.]

THE STATE OF WASHINGTON, *on the Relation of B. V. Egbert.*
Appellant, v. FRED BLUMBERG, as Auditor of
*Skagit County, Respondent.*¹

COUNTIES—CLAIMS—PRESENTATION—COMPENSATION OF FRUIT INSPECTOR. Laws 1903, p. 246, providing that the commissioner of horticulture shall issue his certificate showing the number of days work performed by county fruit inspectors, who shall thereupon receive pay at \$4 per day from the county, does not obviate the necessity of presenting a claim therefor to the county commissioners for allowance before the auditor shall draw a warrant, as required by Bal. Code, § 393, in all cases except for cost and fee bills required by law to be approved by some other judicial tribunal or officer; since the exception applies only to courts, and the law of 1903, does not provide for a warrant by the auditor on the certificate of the commissioner of horticulture.

¹Reported in 89 Pac. 708.

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SAME—COUNTY OFFICERS — APPOINTMENT — STATUTES — CONSTITUTIONALITY. LAWS 1903, p. 246, creating the office of county fruit inspector, to be appointed by the county commissioners for a term of two years, violates the mandatory provisions of the Const., art. 1, § 29, requiring all county officers to be elected, and is void.

MANDAMUS—DEFENSES—VALIDITY OF STATUTE—COUNTY OFFICERS. A county auditor required to issue warrants for the payment of county funds is authorized to inquire whether a law requiring such payment is valid, and to attack the same for invalidity in mandamus proceedings brought against him to compel issuance of a warrant.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered April 27, 1905, dismissing an application for a writ of mandamus, upon sustaining a demurrer to the affidavit. Affirmed.

Robert McMurchie, for appellant.

J. C. Waugh and Smith & Brawley, for respondent.

MOUNT, J.—This action was brought in the lower court for a writ of mandate against the county auditor of Skagit county, to require him to issue warrants upon the county treasurer of that county, payable to the relator, for services as assistant county fruit inspector. The court sustained a general demurrer to the affidavit for the writ. Relator elected to stand upon the allegations thereof, and the action was dismissed. Relator appeals.

The affidavit for the writ alleges, in substance, the appointment of the relator as assistant county fruit inspector; that he discharged the duties of that office for the months of November and December, 1904, and January, 1905; that the commissioner of horticulture allowed relator's claim for salary during said months, and issued to him certificates therefor as required by law; that such certificates were presented to the county auditor with a demand for warrants in payment thereof, but the auditor refused, and still refuses, to issue such warrants. There is no allegation that the claim for services or salary was ever presented to the county commissioners for approval or allowance, and respondent contends

that the affidavit was insufficient for that reason. The act of 1903, Laws 1903, page 246, § 4, provides for the payment of services of the county fruit inspector as follows:

"Said county inspectors shall be entitled to a per diem of \$4.00 per day and actual expenses for each day's actual service, to be paid by the county in which said inspector is appointed. . . . In order to furnish to the office of commissioner of horticulture information regarding the condition of orchards throughout the state, and to determine the compensation of such county inspectors, they shall make monthly reports to the commissioner of horticulture under oath upon blanks furnished by said commissioner and said commissioner of horticulture shall issue a certificate showing the number of days' work performed in each month, upon which the county inspector shall receive payment from the county in which inspection has been made: *Provided*, That monthly reports shall not be conclusive evidence of the number of days' work any county inspector has performed in any month."

The act does not provide that the auditor shall draw his warrant upon the certificate of the commissioner of horticulture. The statute in relation to the duties of county auditor provides:

"He shall audit all claims, demands and accounts against the county which by law are chargeable to said county, except such cost or fee bills as are by law to be examined or approved by some other judicial tribunal or officer. Such claims as it is his duty to audit shall be presented to the board of county commissioners for their examination and allowance. For claims allowed by the county commissioners, as also for cost bills and other lawful claims duly approved by the competent tribunal designated by law for their allowance, he shall draw a warrant on the county treasurer." Bal. Code, § 393 (P. C. § 4060).

The statute relating to the duties of county commissioners provides that:

"The several boards of county commissioners are authorized and required,— . . . 5. To allow all accounts legally chargeable against such county not otherwise provided for. . . . "Bal. Code, § 342 (P. C. § 4098).

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Appellant contends that, because the commissioner of horticulture is required to issue a certificate to the county inspector showing the number of days' work performed in each month, on which the county inspector shall receive payment, the commissioner of horticulture is thereby created an officer for the allowance of claims of this kind, and that the auditor must draw a warrant upon presentation of the certificate without any action by the board of county commissioners. The words "the competent tribunal" in § 393 clearly refer to the judicial tribunal or officer as used in the same section, and mean a court or judge. While we have no doubt that the legislature, if it had seen fit to do so, could have required the county treasurer to issue warrants upon the certificates of the commissioner of horticulture, it has not done so. Section 4 of the statute in relation to horticulture goes no further than to provide that the county shall pay for the number of days certified. In the absence of a provision to the contrary, such claims must be audited, allowed, and paid as other claims against the county. Under similar cases in this court, there can be no doubt that it was the duty of the relator to present his claim to the county auditor in the regular way to be allowed by the county commissioners. *State ex rel. Banks v. Board of Comr's*, 18 Wash. 160, 51 Pac. 368; *State ex rel. Porter v. Headlee*, 19 Wash. 477, 53 Pac. 948. For this reason the affidavit failed to state a cause for the issuance of the writ of mandamus against the respondent.

Another and more serious objection to the application is urged by respondent, viz., that the act is void in so far as it attempts to create the office of county fruit inspector, because the act makes the officer appointive in violation of § 5, art. XI, of the constitution. This question goes to the right of the relator to recover against the county at all, and is fully and fairly presented, and we shall therefore consider it. The section of the constitution referred to, provides:

"The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of

county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers, as public convenience may require, and shall prescribe their duties and fix their term of office."

This provision of the constitution is mandatory. Const., art. I, § 29. It is plain and unambiguous. It requires all county officers to be elected. *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974; *State ex rel. Griffith v. Newland*, 37 Wash. 428, 79 Pac. 983. Section 4 of the horticultural act above referred to clearly attempts to create the office of county fruit inspector. It fixes the term of office of such officer at two years, and the salary of the officer at \$4 per day. It also provides for the appointment of the officer by the board of county commissioners, not temporarily but continually. It is apparent that the legislature did not intend to make the office elective at all. The provision of the act relating to county fruit inspector was, therefore, opposed to the provisions of the constitution cited and is void. It follows, if there was no legal principal county fruit inspector, there could be no assistant.

But it is claimed by appellant that the respondent, being a mere ministerial officer, cannot attack the validity of the statute. A number of authorities are cited to that effect. But we are of the opinion that, in a case like this, where the officer is required to pay out trust funds, he is authorized to inquire whether a law requiring such payment is valid; and it is his duty to defend actions of this kind where the act appears to be opposed to the constitution and therefore void. 19 Am. & Eng. Ency. Law (2d ed.), p. 764, and cases cited.

The judgment of the trial court must therefore be affirmed.

HADLEY, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 6381. Decided April 15, 1907.]

PORT TOWNSEND SOUTHERN RAILROAD COMPANY, *Appellant*,
v. STEFANO BARBARE *et al.*, *Respondents*.¹

EMINENT DOMAIN—DAMAGES—MARKET VALUE—EVIDENCE. In condemnation proceedings the desire or unwillingness of the defendant to sell the land cannot be shown upon the question of its market value.

SAME—EVIDENCE—OTHER SALES. In condemnation proceedings, it is incompetent for the defendant, upon the issue as to the market value of the property, to show the price paid by the condemning party for similar property.

SAME—CROSS-EXAMINATION. Where, in condemnation proceedings, the court has permitted the defendant, on cross-examination of the relator's witnesses, to show the price paid by the relator for similar property, it is error to refuse to allow the relator to show all the facts and circumstances under which its agents purchased the same.

SAME—JUDGMENT—ENTRY—ELECTION. In condemnation proceedings, after an assessment of damages by the jury, judgment cannot be entered for the amount of the award before the relator's election to take the property, nor can the relator be required to make the election at once, but the same may be made within a reasonable time after the decree of appropriation.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered October 3, 1906, after a trial on the merits, for the amount of damages assessed by a jury for the value of land, in a condemnation proceeding upon the relator's refusal to elect to take or abandon the land. Reversed.

J. F. Fitch and Charles Bedford, for appellant.

Walter M. Harvey, for respondents.

MOUNT, J.—This appeal is taken from a judgment in condemnation. The appellant brought the action to condemn certain lands in Pierce county belonging to respondents. The

¹Reported in 89 Pac. 710.

amination to examine the witnesses as to the conditions of the sales and the items taken into consideration in agreeing upon such prices, but refused to permit the appellant to examine the agent of the appellant who purchased the other properties, as to the items and the reasons for paying the prices which had been paid therefor. We think this was error. Proof of sales of similar property to that in question, made at or about the time of the taking, is almost universally approved. 2 Lewis, Eminent Domain (2d ed.), § 443. But purchases by the condemning party are incompetent, and are inadmissible in evidence to prove market value. 2 Lewis, Eminent Domain (2d ed.), § 447.

But, assuming that it was proper to permit the evidence upon cross-examination, the court having permitted the respondents to go into that question, the appellant ought to have been permitted in rebuttal to show all the facts and circumstances taken into consideration when its agents purchased such other lots, so that the jury might intelligently pass upon the question whether such sales were based upon the fair market value of those lots and thereby determine to what extent the selling price of other lots tended to prove the market value of the lots in question. We think justice required this much at least.

It is contended that the court erred in entering up a money judgment and decree of appropriation, before the appellant had taken possession of the land and before the money was paid into court. We settled the practice in this class of cases in *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305, when we said:

"After an adjudication of the necessity of appropriation provided for by Bal. Code, § 5640, two further judgments are required in condemnation proceedings, under our eminent domain act, the first to be entered upon the verdict of the jury, or the findings of the court assessing the damages, for the amount of said damages to be awarded the property owners. Bal. Code, § 5641. If the petitioner pays into court the damages awarded, and takes possession of the

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property, then another judgment or decree of appropriation of the land . . . is required,"

vesting the title in the condemning party. Bal. Code, § 5642 (P. C. § 5107). We have no desire to depart from the rule of the statute or practice there announced. Such rule can work no hardship. The private owner cannot be disturbed in his possession until the award is first paid into court for his use. The condemning party is not entitled to a decree of appropriation until the award is paid into court. The trial court would certainly not be authorized to enter a decree of appropriation upon the motion of the appropriator without the money having been first paid; nor could the court require the party seeking to appropriate to take the property against its will, especially before the damages had become finally determined. It is true no time is fixed within which the condemning party must pay the award. It must, therefore, do so within a reasonable time, or be held to have abandoned the proceedings. Any time before the judgment upon the verdict becomes final cannot be said to be within a reasonable time.

The judgment is therefore reversed, and the cause remanded for a new trial.

HADLEY, C. J., ROOT, CROW, and FULLERTON, JJ., concur.

[No. 6504. Decided April 15, 1907.]

WILLIAM T. PARKER, *Appellant*, v. ARCHIE R. GALBRAITH
et al., *Respondents*.¹

JUDGMENT—RES JUDICATA—IDENTITY OF SUBJECT-MATTER AND OF PARTIES. Where two promissory notes were given in payment for two horses, and the vendee brought suit against the payee to cancel the notes, for fraudulent representations, judgment allowing the plaintiff damages for such fraud, and applying the same upon one of the notes, which was cancelled thereby, is not a bar to an action upon the other note, brought by the assignee of the payee against the vendee and his wife; but the wife, as a member of the community receiving the benefit thereof, is bound by the former judgment, which is *res judicata* as to the defense of fraud.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 23, 1905, upon the verdict of a jury rendered in favor of the defendants, after a trial on the merits before the court, in an action on a promissory note. Reversed.

John M. Glason, for appellant.

Peacock & Ludden, for respondents.

Root, J.—This is an action by appellant to recover from respondents upon their promissory note for \$500, given to one Carmode. From a judgment in favor of defendants, this appeal is prosecuted.

The facts surrounding this controversy are substantially as follows: In November, 1903, Carmode sold to defendants two stallions, and received in payment therefor two promissory notes of \$500 each. Thereafter respondent Archie R. Galbraith brought an action to cancel said notes, upon the ground of misrepresentation as to one of the stallions. That action resulted in a judgment in favor of Galbraith for the recovery of \$500, to the payment of which one of said prom-

¹Reported in 89 Pac. 712.

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issory notes was directed to be applied and thereby cancelled. In that action it was found that the purchase price of the horse, as to which the misrepresentation referred, was \$250. This amount the court doubled, under the statutory provision applicable in such cases. In the present case the same fraud and misrepresentation was pleaded as a defense. Appellant, in his reply to said defense, pleaded the former adjudication. Upon the trial of the case at bar the appellant offered the record of the other case in evidence, which offer was by the court refused. This action of the trial court is now urged as error.

Appellant maintains that the refusal to let him have the benefit of the proceedings and judgment of the former trial amounts virtually to allowing the respondents to again recover upon the same cause of action. Respondents claim that the proceedings and judgment in the former trial are not *res adjudicata*, for the reason that the parties are different, in that the former action was brought by Galbraith without his wife being joined, and against Carmode; while this action is prosecuted by Parker, to whom Carmode had indorsed the note, and against Galbraith and wife as a community.

Regardless of technical distinctions, we think it is evident that these respondents, by virtue of the other judgment, received the benefit of the same subject-matter which they are now urging as a defense. In that case Galbraith claimed that he was damaged by the misrepresentation, and received a judgment in the sum of \$500 as satisfaction for the imposition thus practiced upon him. As it had to do with the same horse and the same transaction, it is difficult to see how the community did not receive the benefit of that adjudication. *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634; *Galbraith v. Carmode*, 43 Wash. 456, 86 Pac. 624; *Isensee v. Austin*, 15 Wash. 352, 46 Pac. 394. The amount allowed in damages in that case wiped out one of the promissory notes. If upon the same subject-matter pleaded as a defense herein, they could defeat the other promissory note, we would have

the position of respondents retaining both horses without having to pay anything therefor. It is not claimed that there was any misrepresentation as to the other stallion, or any reason why payment for him should not be made.

The judgment of the honorable superior court is reversed, and the cause remanded for a new trial, wherein appellant shall be permitted to show the proceedings had in the other case. Respondents shall not be permitted to offset or counterclaim for any amount which they, or either of them, received by reason of the judgment in that case.

HADLEY, C. J., MOUNT, CROW, and RUDKIN, JJ., concur.

[No. 6406. Decided April 22, 1907.]

JAMES SIMMONS, *Respondent*, v. G. R. GARDNER *et al.*,
Appellants.¹

MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF—QUESTION FOR COURT—TRIAL—DIRECTION OF VERDICT. In an action for malicious prosecution, where it appears from the undisputed evidence that the prosecutors acted upon the advice of the prosecuting attorney after making a full and truthful statement of all known facts relating to probable cause for the prosecution, it becomes the duty of the court to find probable cause as a matter of law, and to direct a verdict for the defendants; the burden of proving want of probable cause being on the plaintiff, although he was discharged.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 5, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Reversed.

Metcalf & Jurey, for appellants.

John B. Shorett and George H. Revelle, for respondent.

¹Reported in 89 Pac. 887.

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Opinion Per CROW, J.

CROW, J.—Action for malicious prosecution by James Simmons, plaintiff, against G. R. Gardner and the Seattle Transfer Company, a corporation, defendants. A jury trial resulted in a verdict for the plaintiff, upon which judgment was entered. The defendants have appealed.

The Seattle Transfer Company, for some years past, has been engaged in the transfer and storage business in the city of Seattle, having numerous employees, of whom the respondent, James Simmons, was one, and the appellant G. R. Gardner another, the former being a packer of merchandise, and the latter a special detective. Early in January, 1906, the company learned that certain slot machines, which it held in storage, had been forced open and that about two thousand slugs, of the value of \$10, had been taken therefrom. Shortly thereafter the appellant company, claiming it had information indicating that the slugs had been stolen by respondent Simmons and another employee named Tracy, caused the appellant Gardner to make a complaint charging them with petit larceny. A warrant was issued and they were arrested. The respondent, Simmons, was thrown into jail, where he remained for two or three days until released on bond. About ten days later, after learning that Tracy had six small children dependent on him, with no other person to care for them, appellants called upon the prosecuting attorney and asked his consent to dismiss the criminal prosecution against Tracy. They were accompanied by Tracy himself, and claim that he admitted his guilt and implicated Simmons. The appellants further stated to the prosecuting attorney that, if Tracy was released, they did not think it would be just to prosecute Simmons, and asked for his discharge also. Both defendants were then discharged with the consent of the prosecuting attorney, upon payment of costs by the appellants. The respondent Simmons, thereupon instituted this action for malicious prosecution.

The appellants contend that the trial court erred in denying their motion for a directed verdict, made at the close of

the evidence, and in support of such contention insist that the prosecution of Simmons was upon probable cause; that it was instituted after they had fully and truthfully stated all facts and circumstances known to them, to their own attorney, and also to the prosecuting attorney of King county, both of whom advised criminal prosecution; and that the prosecuting attorney drew the complaint upon which it was based. While they admit the criminal prosecution and its dismissal, they deny that it was without probable cause or that it was malicious.

The respondent, after showing his arrest, imprisonment, and discharge, testified that he was innocent of the charge made, and denied that he had taken any slugs or knew of Tracy taking any. Tracy, who testified on behalf of respondent, denied that he knew of respondent taking or having any slugs. Respondent offered evidence to show that the appellant Gardner, accompanied by other parties, called upon him and Tracy at the jail, and questioned them separately as to a certain surveyor's instrument of considerable value which was missing from the warehouse, then stating that he cared nothing about the stolen slugs, but wanted to find the missing instrument. This evidence was denied by Gardner and the parties who were with him, although they admit that he did ask about the lost instrument. It does not appear that the appellants ever claimed that either Tracy or Simmons had taken or stolen the instrument.

The appellants introduced evidence showing that, for some time prior to the arrest, continued pilfering had been in progress at the warehouse; that in addition to other losses, several slot machines had been opened and slugs taken therefrom: that Mr. Simmons when intoxicated had said to one Arnold, the company foreman: "Well, Arnold, old boy, you want to watch that man Tracy"; that being asked why, he said: "Well, old Jim ain't going to get in trouble, but I will tell you now that there is things going on that ain't right, and you had better watch that fellow Tracy"; that Simmons re-

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fused to make any further statement; that thereafter Tracy and Simmons were frequently seen together; that they visited different saloons where Tracy played the missing slugs into the slot machines; that they drank on his winnings; that the slugs played by Tracy were of peculiar design, identical with those missed from the warehouse but not like any others known in the city; that they were afterwards taken from the machines where Tracy played them; that Tracy had been seen giving some of the slugs to Simmons, who played them in other machines; that Tracy had a key which admitted him to the warehouse where the machines were stored; that appellants had told all these facts and circumstances to their attorney and to the prosecuting attorney fully and truthfully; and that the prosecuting attorney thereupon drew the complaint and advised the prosecution.

The prosecuting attorney himself, as a witness for the appellants, confirmed these statements, detailing at length all of the information communicated to him. Witnesses were also introduced by appellants who testified that Tracy and Simmons had been seen frequently in saloons where Tracy played the slugs; that they were then drinking together; that the slugs were afterwards taken from the machines; that Tracy gave some of them to Simmons, who played them himself; that they had communicated all of this information to the appellants prior to the arrest; that Simmons and Tracy had access to the room where the machines were stored, Tracy having a key in his possession. Upon this showing, the appellants contend they were entitled to a directed verdict, and insist not only that these facts and circumstances of themselves were probable cause, but further contend that, when they had fully and truthfully detailed to the prosecuting attorney all these facts and circumstances as known to them, and were advised by him to proceed, such showing constituted probable cause preventing recovery by the respondent. It is not the policy of the law that any citizen shall be wrongfully subjected to a criminal prosecution instituted with malice and

without probable cause. It is, however, the policy of the law that, when probable cause does exist a criminal prosecution shall be instituted. In *Ball v. Rawles*, 93 Cal. 222, 228, 28 Pac. 937, the court said:

"Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and when the acts of the citizen in making such exposure are challenged as not being within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury."

Although it is conceded that the respondent was arrested at the instance of the appellants, and that he was afterwards finally discharged, the burden is on him to further show that the criminal prosecution was instituted (1) without probable cause, and (2) with malice. Both of these elements must exist as a condition precedent to a recovery by him. Want of probable cause without malice is of no avail; nor will malice of itself be sufficient if probable cause be shown. It therefore follows that if probable cause did exist in this case, the respondent can in no event recover.

The appellants insist that there can be no question but that they actually made full and truthful statements to the attorneys who advised the prosecution; that probable cause

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therefore existed as a matter of law; that when the facts are not in dispute the existence or nonexistence of probable cause is a question of law for the court, which should not be submitted to the jury. It is undoubtedly the law that if any issue of fact exists, under all the evidence, as to whether the appellants did fully and truthfully communicate to the attorneys consulted all the facts and circumstances within their knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697. On the other hand, if it appears that the statements as to the attorneys were truthful, full, and complete, giving all material facts and circumstances within the knowledge or information of appellants, then the existence or nonexistence of probable cause becomes a question of law for the court, which should not be submitted to the jury. *Newell, Malicious Prosecution*, pp. 14, 278; *Levy v. Fleischer*, 12 Wash. 15, 40 Pac. 384; *McNully v. Walker*, 64 Miss. 198, 1 South. 55; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434; *Anderson v. Friend*, 85 Ill. 135; *Atchison Etc. R. Co. v. Smith*, 60 Kan. 4, 55 Pac. 272; *Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576; *Rogers v. Olds*, 117 Mich. 368, 75 N. W. 933.

The supreme court of Illinois, in *Anderson v. Friend*, *supra*, said:

"It has been uniformly held that, where the prosecutor fairly presents all the facts to a respectable practicing attorney, who, from such a statement of facts, advises they are sufficient to warrant a prosecution, the prosecutor is protected against a suit for malicious prosecution, and, from the very nature of our criminal laws, it must be so, otherwise there would be no safety in originating such proceedings. But few persons outside the profession can determine, in many cases, whether the facts will justify a criminal conviction; but it is to be presumed that all respectable attorneys in full practice do know, and it is their duty to fairly and honestly

advise in these as in all other cases; and if a prosecutor may not safely act upon such advice, then he has to almost guarantee a conviction when he starts a prosecution. The criminal law must be enforced, and human agencies must be employed for the purpose, and the law wisely protects all persons who in good faith act on reasonable presumptions of the guilt of the accused; and where the prosecution is commenced on the advice of respectable counsel, after fairly presenting to his consideration all the facts, and he advises that they are sufficient, it cannot be held the prosecution is groundless and there is a want of probable cause."

The supreme court of Michigan, in *Rogers v. Olds, supra*, said:

"Citizens must be left free to, in good faith, state to the proper officers the grounds for their belief that a crime has been committed, and that a certain person is the offender. It is true, they must have reasonable grounds for their belief, and act in good faith. This is all that the law requires. . . 'This action is strictly guarded. It is never encouraged, except in plain cases. Were it otherwise, ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law, and to discharge his duty to society, with the prospect of an annoying suit staring him in the face.'"

We are satisfied from undisputed evidence that the appellants did make full, truthful and complete statements, and that the prosecuting attorney, having all information possessed by them, advised them to proceed. The respondent, however, contends that they did not make a full and truthful statement to the prosecuting attorney; that as shown by the evidence the slugs were continually scattered about the floor of the warehouse where any employee of the company could see or obtain them; that employees did see them, and played them back in the machines, to which they belonged; that appellants did not communicate these facts to the attorneys. He also contends that, although appellants told the attorneys Simmons and Tracy had access to the room where the machines were stored, they did not tell them that some

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fifty other employees had like access during business hours. The evidence does not show the appellants had any knowledge or information that slugs were scattered around as stated. Hence, they could not make any such a statement to the attorneys. It did appear that, on one occasion when the owner of the machines called at the warehouse to repair some of them, a few slugs fell on the floor while he was working, and that, in his presence and with his knowledge, some employees then present played them back into the machine from which they had fallen. As to the failure to inform the attorneys that all employees had access to the room during business hours, we fail to see how such an omission became material, or how that fact, if told, would remove suspicion from Simmons or Tracy. Simmons had been frequently seen with Tracy who had a key admitting him at all times. These and all other material facts were made known to the attorneys. No other employee was shown to have associated with Tracy under like circumstances. The question was whether probable cause existed against Simmons and Tracy. All known facts or circumstances affecting them were fully and truthfully stated. No question is raised by respondent but that truthful statements were made, except as above suggested, and the appellants' evidence stands without dispute. The facts shown, coupled with the advice given by the prosecuting attorney, constituted probable cause as a matter of law sufficient to justify the prosecution and avoid any recovery by the respondent herein.

The motion for a directed verdict should have been sustained. The judgment is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., ROOT, FULLERTON, and MOUNT, JJ.,
concur.

[No. 6578. Decided April 22, 1907.]

JOHN CLAPP *et al.*, *Appellants*, v. HARRIET A. ERVAY *et al.*,
Respondents.¹

QUIETING TITLE—TRUST OR ESTATE RESERVED—EVIDENCE—SUFFICIENCY. Where a judgment creditor is seeking to subject to his judgment, lands held in fee by plaintiffs' daughter and son-in-law, claimed by plaintiffs to be held in trust for them to secure a life estate therein, plaintiffs' action to quiet title is properly dismissed for insufficiency of the evidence, where the plaintiffs' evidence of such trust appears not entitled to credit and inconsistent with their acts indicating that the land was conveyed and held in fee simple in consideration of a personal agreement to support the parents for life without any intent to reserve any lien or interest in the land.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered August 31, 1906, upon findings in favor of the defendants, dismissing an action to quiet title and restrain an execution sale of real estate. Affirmed.

J. H. Naylor and Merrick & Mills, for appellants.

Coolcy & Horan, for respondents.

Crow, J.—This action was commenced by John Clapp, Elizabeth Clapp, his wife, and Sarah J. Hill, against Harriet A. Ervay, Frank P. Brewer, as sheriff of Snohomish county, and Albert E. Hill, to obtain a decree adjudicating that John Clapp and Elizabeth Clapp are the owners of a life estate in certain improved lots in Edmonds, Snohomish county, Washington, and to restrain Frank P. Brewer, as sheriff, from selling the lots at execution sale. John Clapp and wife are the parents of their coplaintiff Sarah J. Hill, who is the wife of the defendant Albert E. Hill.

The plaintiffs claim that, about the year 1898, Clapp and wife advanced \$500 to purchase from one John Anderson the lots in question, and afterwards advanced \$300 more;

¹Reported in 89 Pac. 883.

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that title was taken in the name of Sarah J. Hill, with the understanding that she and her husband, Albert E. Hill, were to support Clapp and wife for the remainder of their natural lives; and that Clapp and wife were to have a life estate, make the property their home, and live thereon with Hill and wife. The fee simple title was conveyed to Sarah E. Hill by Anderson, and no agreement, mortgage, or other written instrument was executed by any of the parties, showing that Clapp and wife or either of them were to have or hold any interest, either legal or equitable. There is evidence indicating that Mrs. Clapp had some other property, and about two years later on August 20, 1900, Sarah J. Hill and her husband executed a written instrument, reciting that, whereas, Elizabeth Clapp had made a will bequeathing all her property to Hill and wife, and whereas the Hills were then living with Clapp and wife, it was in consideration of the premises and of the making of said will, mutually agreed that Hill and wife should provide for Clapp and wife during their lifetime. This instrument contained no mention of any previous agreement, nor did it refer to the lots described in the deed from Anderson to Mrs. Hill. It was not signed by Clapp and wife, but was delivered to and held by them, and they had full knowledge of its contents.

On July 5, 1906, the defendant Harriet A. Ervay obtained a judgment in the superior court of Snohomish county against Albert E. Hill and Sarah J. Hill. The claim upon which this judgment was based originated in certain fraudulent acts of Hill and wife, whereby they had wrongfully obtained money from Mrs. Ervay. On July 6, 1906, an execution was issued upon this judgment and placed in the hands of the defendant sheriff, who, being about to sell the real estate above mentioned, was prevented from doing so by the commencement of this action.

On July 9, 1906, Albert Hill and wife, as parties of the first part, entered into a second written agreement with John Clapp and wife, as parties of the second part, which in sub-

stance recited that it was the original intention of all the parties, at the date of the purchase of the property, that the parties of the second part should have a lien upon the premises as security for their right to reside thereon during the remainder of their natural lives, and for their comfortable support; that Sarah J. Hill had thereafter held the title upon such condition; and that she and Albert E. Hill had agreed to suitably maintain and support the parties of the second part during their natural lives. On the same date Albert E. Hill and wife filed a declaration of homestead upon the property. The plaintiffs commenced this action on August 15, 1906.

The trial court found that, when the plaintiffs Clapp and wife originally paid \$500 for the property in 1898, the title was taken in the name of Sarah J. Hill with their full knowledge, consent, and approval, and with the full intention that the absolute title should be and remain in her; that when they afterwards advanced \$300 additional for the construction of buildings and improvements, such advancement was made with a like intention; that in consideration of advancing such money to Sarah J. Hill for the purchase and improvement of the property, she and her husband, Albert E. Hill, contracted and agreed to provide for Clapp and wife during their lifetime; that such agreement for their support was purely a personal contract; that it was not intended to operate as a lien upon the property, and did not vest in John Clapp and Elizabeth Clapp, or either of them, any interest, legal or equitable. Upon the findings made, a decree was entered dismissing the action. The plaintiffs have appealed.

The controlling question on this appeal is whether the findings of fact made and entered by the trial court are sustained by competent and material evidence. We have carefully examined the entire record, and conclude that they are sustained by its clear preponderance. It appears that Clapp and wife and Hill and wife had been living together for

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some time prior to purchasing the land; that the former were very old and feeble, making their testimony very indefinite and unsatisfactory. The principal evidence relied upon by the appellants is that of Hill and wife, and the statements made by them, especially on cross-examination, do not appeal to us as credible. They are interested parties, and we are not compelled to credit their evidence, when their statements, although uncontradicted, do not bear the impress of truth or appear to be worthy of belief. Their attempted explanations of the absence of any written instrument at the date of the original purchase, showing the alleged interest of Clapp and wife, do not seem reasonable, being especially inconsistent with the agreement of August 20, 1900, made some two years later, which expressly stated that the consideration for the support of Clapp and wife was the will made by Mrs. Clapp. The fraud which they perpetrated upon the respondent Mrs. Ervay, as shown by the pleadings and the verdict of the jury in the case of Harriet A. Ervay v. Albert E. Hill and Sarah Hill, his wife, in which she obtained her judgment, does not lend credibility to their otherwise improbable statements. Their execution of another written agreement inconsistent in its terms with that of August 20, 1900, and their filing of a declaration of homestead immediately after the entry of judgment against them not only look suspicious, but seem to have been an afterthought. The entire evidence indicates that Clapp and wife had the property conveyed to Mrs. Hill with the intention that she should hold the full fee simple title in her own right, without any lien or claim in them; that if any agreement existed at that time for their support, it was one in which, as found by the trial court, they looked to the Hills personally, without security, and without regard to the title to the property.

The findings are sustained by the evidence and warrant the judgment entered. The judgment is affirmed.

HADLEY, C. J., ROOT, FULLERTON, and MOUNT, JJ., concur.

[No. 6647. Decided April 22, 1907.]

R. H. OSBORNE, *Appellant*, v. MARY C. OSBORNE *et al.*,
Respondents.¹

MORTGAGES—DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. An absolute deed, executed by one of two joint makers of promissory notes, in consideration of a written release from all liability on the notes and the surrender of an individual note against him, is not shown to have been intended as a mortgage by the grantor, who claimed to be only a surety on the notes, where there is no evidence that he signed the notes as surety, and where the evidence shows that the lands were held by the grantee in trust for the other maker of the note, who assumed all liability thereon, and went into possession of the property, paid the taxes thereon, and redeemed the property by payment of the notes.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 30, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action of ejectment. Affirmed.

Oscar Cain and *T. P. & C. C. Gose*, for appellant.

Sharpstein & Sharpstein, for respondents.

CROW, J.—This action was commenced by R. H. Osborne, plaintiff, against Mary C. Osborne, Dollie F. Maling, Baker & Baker, a corporation, and John W. Langdon, as administrator of the estate of O. Osborne, deceased, defendants, to recover title to, and possession of, two hundred and eighty acres of land in Walla Walla county. The plaintiff and O. Osborne, now deceased, were brothers. The defendants Mary C. Osborne and Dollie F. Maling are the widow and daughter of O. Osborne, deceased, being his only heirs at law. On January 1, 1890, the plaintiff and his brother, O. Osborne, executed and delivered their three joint and several promis-

¹Reported in 89 Pac. 881.

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sory notes for the total sum of \$4,940.20. On December 7, 1891, the plaintiff executed and delivered his separate and individual note for \$450. On the last-mentioned date the plaintiff, being the owner of the land in dispute, executed and delivered to the executors of the estate of D. S. Baker, deceased, his mortgage deed thereon to secure the payment of the three joint and several notes for \$4,940.20 above mentioned, and his individual note for \$450.

The plaintiff alleges that the three joint and several notes first mentioned were the debt and obligation of his brother, O. Osborne; that he signed the same as surety only, although his name appeared thereon as maker; that on May 24, 1899, all of the notes being past due and unpaid he, for the purpose of further securing the payment of the three joint and several notes, by warranty deed conveyed the land in dispute to the executors of the estate of D. S. Baker, deceased, who afterwards deeded the same to the defendant corporation Baker & Baker, which held it subject to the same conditions and trust upon which the executors had received it; that the consideration received by plaintiff for his warranty deed was his release from personal liability on the three joint and several notes, the surrender to him of his own note of \$450, then amounting to \$915.83, and the payment to him of the sum of \$300 in cash; that his brother, O. Osborne, afterwards paid the three joint and several notes from the rents, issues, and profits of the land; that the land being now freed from the mortgage lien, belongs to the plaintiff, who had conveyed it as security only, and that the defendant corporation, Baker & Baker, now wrongfully claims to hold it in trust for the estate of O. Osborne, deceased.

The defendants, while admitting the execution and delivery of the notes, mortgage, and deed, and the payment of the three joint and several notes by O. Osborne, deny plaintiff's allegation that the warranty deed was intended to be a mortgage. They contend that it was executed by the plaintiff with the intention that it should be an absolute convey-

ance as against him; that he was released from personal liability on all of the notes; that the three joint and several notes were in fact the debt of himself and O. Osborne; that when the warranty deed was made, the title was to be held in trust for the benefit of O. Osborne, who then assumed all liability on the joint and several notes and afterwards paid the same in full; that O. Osborne immediately entered into the exclusive possession of the land; that he and his estate have ever since been in the exclusive possession thereof, and that the land now belongs to his estate, the plaintiff having no interest therein. The trial court entered judgment in favor of the defendants dismissing the action. The plaintiff has appealed.

No question of law is raised on this appeal. The only issue of fact involved is whether the warranty deed executed and delivered by the appellant to the executors of D. S. Baker, deceased, was in fact a mortgage as he now contends. It is an absolute warranty deed upon its face. The appellant, at its dates, received a consideration for its execution and delivery, which he does not by any evidence now attack as being either invalid or inadequate. He accepted from his grantees a written instrument, releasing and discharging him from personal liability on the three joint and several notes. These notes upon their face were the obligation of himself as well as of his brother O. Osborne. No competent evidence has been introduced by him to show that they were the separate obligation of O. Osborne for which he was surety only, as he now contends. O. Osborne assumed and paid the entire indebtedness evidenced by the three notes. At his request the deed was secured from the appellant who then had notice that the title was to be held in trust for O. Osborne. The appellant has at no time since executing the deed been in possession of, or cultivated, the land. He has paid no taxes. He never made any claim of title, or that his deed was a mortgage, until he commenced this action in April, 1905, at which time O. Osborne was dead and the

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joint and several notes had been fully paid. The trial court, without making separate findings, included in its final decree the following finding of fact:

"That the deed made by plaintiff to Miles C. Moore, Edwin F. Baker, Henry C. Baker, Walla Walla Will Baker, executors of the last will and testament of Dorsey S. Baker, deceased, was intended by both the grantor and grantees as an absolute conveyance and relinquishment of all right, title and interest of said plaintiff in the land therein described and that the plaintiff is not and was not at the time of the commencement of this action the owner of, or in any wise interested in, the property described in plaintiff's complaint."

We think this finding is supported by the clear preponderance of the evidence, and that it sustains the final judgment, which is affirmed.

HADLEY, C. J., ROOT, FULLERTON, and MOUNT, JJ., concur.

[No. 6585. Decided April 23, 1907.]

WILLIAM B. SCAIFE & SONS COMPANY, *Appellant*, v. THE STANDARD ICE COMPANY, *Respondent*.¹

SALES—ACCEPTANCE—SUFFICIENCY. No completed contract of sale appears where, at the time of accepting by telegraph a telegraphic order for ice cans, the manufacturer wrote a letter confirming the acceptance, but requesting either satisfactory references or else remittance for one-half the price with condition that the goods be shipped with sight draft attached to bill of lading, and six days later, having received only the buyer's hurry-up order before receipt of the letter, wrote again for answer to the letter, stating that the order had been entered and that it trusted everything would be arranged to their mutual satisfaction, to which letters the buyer made no reply, and later refused to accept the shipment when notified thereof.

Appeal from a judgment of the superior court for King county, Joiner, J., entered August 6, 1906, in favor of the

¹Reported in 89 Pac. 882.

defendant, after a trial upon an agreed statement of facts, in an action on a contract of sale. Affirmed.

McClure & McClure, for appellant.

Horace A. Wilson, for respondent.

CROW, J.—This action was commenced by William B. Scaife & Sons Company, a corporation, plaintiff, against The Standard Ice Company, a corporation, defendant, to recover the purchase price of three hundred and forty galvanized ice cans, manufactured by appellant at Pittsburg, Pennsylvania, and shipped to defendant at Seattle, Washington. The case was tried upon an agreed statement of facts. From a judgment in favor of the defendant, the plaintiff has appealed.

The respondent Ice Company, on March 28, 1905, wrote appellant, requesting quotations on three hundred and forty ice cans of specified size and material. On April 3, 1905, appellant answered, quoting net prices. The respondent Ice Company, on April 19, wired:

“Ship three hundred forty cans at three thirty-six f. o. b. Seattle per letter, inch taper from top to bottom. Rush. Answer.”

Appellant, on April 20, wired:

“Answering telegram 19th inst., accept order. Cans tapered 1 inch. Otherwise same we last described. Shall we proceed? Answer.”

On the same date, April 20, 1905, the appellant wrote the respondent Ice Company a letter confirming the last-mentioned telegram, and said:

“As we have had no previous business transactions with your concern, and are unable to get any satisfactory information through the mercantile agencies regarding your financial standing, we must respectfully request that you either furnish us satisfactory references from some concern in this city, or else remit us for one-half the amount of invoice for the 340 cans now and give us privilege of forwarding ship-

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ment with sight draft attached to bill of lading for balance of amount at time we have the cans ready to forward."

On April 21, after receipt of the above telegram of the 20th, but before receipt of the letter, the respondent Ice Company wired the appellant, "Proceed and ship cans at earliest possible date." The appellant, having received no further word, on April 26, wrote respondent the following letter:

"We received your telegram of the 21st reading: 'Proceed and ship cans at earliest time possible,' and have accordingly entered your order for our best attention, and placed requisition for the necessary material for making cans. We hope to receive a reply to our letter of the 20th in a day or so, and trusting everything may be arranged to our mutual satisfaction, we remain, Yours very truly," etc.

No further correspondence took place, nor was any cash payment made by the respondent. The appellant, however, proceeded to manufacture the cans for respondent. On June 24, 1905, the respondent, learning from the Great Northern Railway Company that a shipment of cans was about to be made, wired appellant: "Ship no cans. Too late. Cannot use."

On June 26, the appellant wired in answer:

"Telegram 24th received after closing Saturday. Cans were shipped Saturday morning. Cannot allow cancellation."

On the same date it also wrote the respondent, explaining its delay in shipment, but insisting that respondent was obliged to accept the cans. On June 26th, respondent again wired appellant: "Will under no consideration accept cans," and on June 27th, wrote a letter explaining that it would not accept the cans as no contract had been completed, and it had purchased elsewhere.

The only question to be determined is, whether a contract of sale exists which may be enforced in this action. Appellant insists that its telegram of April 20 was an absolute acceptance of respondent's order; that respondent's answering telegram of April 21 completed the contract, before appel-

lant's letter of April 20, asking for the cash deposit, reached respondent at Seattle; that the letter did not modify or avoid the completed contract; that it was simply an attempt upon appellant's part to secure an advance cash payment, no previous business transaction having occurred between the parties. In other words, the appellant now insists on eliminating from our consideration all letters and telegrams subsequent to its telegram of April 20 and respondent's telegram of April 21. Were we to do so, a completed contract might possibly be inferred, but the appellant, by reason of its conduct in writing its letters of April 20 and 26, imposing further conditions, and thereafter proceeding without further word from the respondent, is now in no position to insist on any such result.

A completed contract requires that the minds of the parties shall have fully concurred, and that they shall have agreed on all essential details. Did these parties fully agree? We think not. The appellant's telegram and letter of April 20, while separate instruments, were in reality but one complete communication, and must be considered together, although the respondent had wired appellant to proceed with the order before it received the letter which had not been mentioned in the appellant's wire. When the letter finally reached respondent, it at once became apparent that the appellant had only accepted its order on condition that an advance cash payment should be made. This further appeared from the language contained in the appellant's subsequent letter of April 26. After the receipt of these two letters, the respondent conducted no further negotiations, but remained silent. If the appellant then proceeded with the manufacture and shipment of the cans before insisting on a further communication from respondent, it did so at its peril. Were we to concede appellant's position and hold that the telegrams of April 20 and 21 fully completed a contract, it would still seem that its letters of April 20 and 26, subsequently received by respondent, amounted to a conditional

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rescission in which the respondent, by silence, acquiesced. It cannot be seriously contended that the respondent consented to any modification of any alleged existing contract, as it did not make the cash payment requested.

The honorable trial court properly held that no enforceable contract existed between the parties. The judgment is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 6327. Decided April 23, 1907.]

F. A. LEONARD, *Appellant*, v. W. S. BASSINDALE,
Respondent.¹

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ANTI-TRADING STAMP ACT. State Const. art. 1, § 3, and the Fourteenth Amendment to the Federal constitution, providing that no person shall be deprived of property without due process of law, are violated by the anti-trading stamp act (Laws 1905, p. 376), making it a misdemeanor to sell or exchange property under an inducement or representations that an unidentified or chance prize or premium, or trading stamp or like device entitling the holder to receive a prize or redemption of stamps, is to be part of the transaction.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 25, 1906, in favor of the defendant, adjudging the constitutionality of the anti-trading stamp act, which makes it a misdemeanor to sell or exchange property under inducement or representations that an unidentified or chance prize or premium, or trading stamp or like device entitling the holder to receive a prize or redemption of stamps, is to be part of the transaction. Reversed.

Burkey, O'Brien & Burkey, for appellant.

John C. Stallcup and J. W. A. Nichols, for respondent.

¹Reported in 89 Pac. 879.

FULLERTON, J.—The single question involved on this appeal is the constitutionality of the act of the legislative assembly of March 14, 1905, commonly known as the anti-trading stamp act. Laws 1905, p. 376. The trial court upheld the statute and gave judgment accordingly; but it is claimed by the appellant that the act violates section 3 of art. 1, of the state constitution, which provides that, "No person shall be deprived of life, liberty or property without due process of law." Acts of similar import, under similar constitutional provisions, have been held invalid by the courts of all the states which have been called upon to pass on the question. See, *State v. Shugart*, 138 Ala. 86, 35 South. 28, 100 Am. St. 17; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588; *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385; *Long v. State*, 74 Md. 565, 22 Atl. 4, 28 Am. St. 268, 12 L. R. A. 425; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958; *City of Winston v. Besson*, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983; *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 84 Am. St. 818, 48 L. R. A. 755; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465. Similar acts have been held invalid as a violation of the fourteenth amendment to the constitution of the United States, by the Federal courts, in the following cases: *Ex Parte Hutchinson*, 137 Fed. 950; *Sperry & Hutchinson Co. v. Temple*, 137 Fed. 992. Our attention is called, also, to a recent decision of the District Judge of the Western District of Washington, wherein he held the act in question to be in violation of this provision of the Federal constitution. The decision, however, so far as we are advised, has not been reported.

The only cases upholding the law are, *Humes v. City of Ft. Smith*, 93 Fed. 857; *Lansburgh v. District of Columbia*, 11 D. C. App. 512. These cases, it may be remarked, are

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among the earlier ones to reach the courts where the question was presented, but neither the reasoning on which they were based, nor the unquestioned ability of the courts pronouncing the decisions, seem to have been able to withstand the overwhelming trend of opinion to the opposite view.

While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority and hold the statute unconstitutional, especially in view of the fact that the Federal courts have shown an inclination to hold the statute in contravention of the constitution of the United States.

The judgment appealed from, since it is based on the constitutionality of the act, must be reversed and the cause remanded to the lower court, with instructions to proceed further with the case in disregard of the statute. It is so ordered.

HADLEY, C. J., ROOT, CROW, MOUNT, and DUNBAR, JJ.,
concur.

[No. 6506. Decided April 23, 1907.]

THE STATE OF WASHINGTON, *On the Relation of Northern
Pacific Railway Company et al., Appellants,*
v. THE SUPERIOR COURT FOR KING
COUNTY, *Respondent.*¹

EMINENT DOMAIN—REVIEW—CERTIORARI—ADEQUACY OF REMEDY BY APPEAL. Certiorari does not lie to review an adjudication of public use in condemnation proceedings instituted by a city of the third class; since, under Laws 1905, p. 84, § 50, providing that the procedure as to appeals therein shall be the same as in other civil actions, review thereof may be had upon appeal, and the adequacy of the remedy by appeal is not affected by the fact that it is not as speedy, when the delay does not deprive appellant of the fruits of the appeal.

¹Reported in 89 Pac. 879.

Certiorari to review a judgment of the superior court for King county, Albertson, J., entered October 12, 1906, adjudging a public use, in condemnation proceedings. Dismissed.

Carroll B. Graves and Piles, Howe & Farrell, for relator.

I. H. Randolph and Wilson & Thorgrimson, for respondent.

FULLERTON, J.—The city of Georgetown, in King county, passed an ordinance providing for the extension of a public street in that city, known as Saunders Avenue, from a point near its present terminus to Rainier Avenue. The street as projected crossed the tracks of the Northern Pacific Railway Company and the Columbia and Puget Sound Railroad Company, and condemnation proceedings were begun by the city against the companies to procure the necessary right of way. On the hearing the trial court adjudged that the contemplated use to which the city sought to appropriate the property was a public use, and ordered a jury impaneled "to ascertain the just compensation to be paid the railroad companies for the property taken or damaged by the establishment of the street." Thereafter the railroad companies applied *ex parte* to this court for a writ of review to review the proceedings of the lower court, and particularly the adjudication that the use for which the city sought to appropriate the property was a public use. The writ was granted, and on the return day appointed, the city, as a part of its return, moved to quash the writ on the ground that it was improvidently issued, as the railroad companies had a plain, speedy and adequate remedy by appeal.

The motion to quash must be granted. In this state the writ of review lies to review the judgment of an inferior court or tribunal only where there is no appeal, or in the judgment of the court no plain, speedy and adequate remedy at law. Bal. Code, § 5741 (P. C. § 1396). The act of the legislature relating to condemnation proceedings for necessary public improvements by cities of the third class to

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Opinion Per FULLERTON, J.

which the city of Georgetown belongs, provides that the practice and procedure under the act in relation to taking appeals and the prosecution thereof shall be the same as in other civil actions. Laws 1905, p. 84, § 50. In *Puyallup v. Lacey*, 48 Wash. 101, 86 Pac. 215, we held that this language made the general statutes relating to appeals applicable to such proceedings, and that under these statutes an appeal would lie from the order adjudging that the contemplated use for which the property is sought to be taken is really a public use, as well as from the order fixing the sum to be paid for the property taken or damaged.

That the remedy by appeal is adequate, within the meaning of the statute, there can be but little dispute, as all questions that can be brought before the court by a writ of review can be brought before it by an appeal. Nor should the writ be granted because the remedy by appeal is less speedy than the remedy by writ of review. The length of time it will take to prosecute an appeal is not a test of the efficiency of the remedy. It must further appear that the delay incident to the appeal will work a deprivation of some substantial right which will prevent the enjoyment of the fruits of the appeal, before it can be said that the remedy is inefficient.

The motion to quash is granted, and the application dismissed.

HADLEY, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 6539. Decided April 23, 1907.]

M. O. TIBBITTS *et al.*, *Respondents*, v. T. J. HENRY *et al.*,
Appellants.¹

APPEAL—BONDS—SUPERSEDEAS—SUFFICIENCY. Where the bond on appeal conditioned also as a supersedeas bond, is in less than double the amount of a money judgment and two hundred dollars additional, the same is ineffectual for any purpose and the appeal will be dismissed.

SAME—FIXING AMOUNT OF BOND. An appeal from a judgment quieting title, and for costs, will be dismissed where the bond on appeal is conditioned also as a supersedeas bond, without the amount thereof having been fixed by order of the trial court.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 19, 1906, upon findings in favor of the plaintiff, after a trial on the merits, in an action to quiet title. Dismissed.

M. J. Cochran and *Carroll B. Graves*, for appellants.

Reeves & Reeves, for respondents.

PER CURIAM.—This is an action to quiet title and to enjoin the defendants from using the waters of a small stream in Chelan county, which flows through their lands and lands of the plaintiffs. Upon trial a final decree was entered, quieting plaintiffs' title, enjoining the defendants, and also awarding judgment to plaintiffs for \$123.50, costs. The defendants have appealed from the judgment and decree and from each and every part thereof.

The respondents have moved to dismiss the appeal, on the grounds, (1) that a money judgment in the sum of \$123.50 was rendered against the appellants, and that their appeal bond, being conditioned as both an appeal and a supersedeas bond in the sum of \$300, is insufficient in amount; (2) that

¹Reported in 89 Pac. 880.

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the judgment and decree awards equitable relief in addition to the money judgment; that the bond is conditioned as both an appeal and supersedeas bond, and that no order of court was ever made fixing the amount of such supersedeas bond. The bond recites the following conditions:

"The condition of the above obligation is such that whereas the above named plaintiff on the 19th day of July, A. D. 1906, recovered judgment against the above named defendants for the sum of one hundred and twenty-three dollars and fifty cents, and for a judgment and decree quieting title to section 25, township 24, N. R. 18 E., W. M., and for an injunction enjoining and restraining defendants from entering upon the lands aforesaid and from maintaining or repairing any irrigating ditches thereon or using any of the waters of Olalla Creek while thereon in the said superior court . . . Now therefore, if the said principal T. J. Henry and Augusta Henry, his wife, shall pay to M. O. Tibbitts and Dora A. Tibbitts, his wife, the sum above named, all costs and damages that shall be adjudged against them on the appeal, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the said supreme court may render or order to be rendered by said superior court, not exceeding the amount or value of the above named original judgment, as above set forth, then this obligation to be void; otherwise to remain in full force and effect."

This language clearly indicates that the undertaking was intended by the appellants to operate both as an appeal and supersedeas bond. A bond conditioned as both an appeal and supersedeas, and so intended is insufficient for any purpose, unless given in double the sum of the money judgment and \$200 in addition thereto. This bond is for \$300 only, and not sufficient in amount. *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999. Nor is the undertaking, when conditioned as both an appeal and supersedeas bond, effectual for any purpose when the decree from which the appeal is taken grants relief other than, and in addition to, the payment of money, unless the amount of the supersedeas bond has

been fixed by order of the trial court, which has not been done in this case. In *re Drasdo's Estate*, 35 Wash. 412, 77 Pac. 735; *Macy v. Sullivan*, 41 Wash. 564, 84 Pac. 601.

The appeal is dismissed.

[No. 6428. Decided April 23, 1907.]

JOHN O'CONNOR, *Respondent*, v. BESSIE SLATTER, *Administratrix of the Estate of John Slatter, Deceased*,
Appellant.¹

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON. Bal. Code, § 5991, providing that a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had with a deceased person, where the "adverse" party sues or defends as executor, administrator or legal representative of the deceased, does not disqualify an interested party, defending as administratrix, from testifying on behalf of the estate of such deceased as to such transactions had with him.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 28, 1906, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, after a trial on the merits, in an action on promissory notes. Reversed.

Richardson, Roche & Onstine and *D. W. Hurn*, for appellant.

Merritt, Oswald & Merritt, for respondent.

MOUNT, J.—This action was brought by the respondent against the appellant, to recover upon several promissory notes guaranteed by indorsement by John Slatter during his lifetime. The appellant is the widow of John Slatter, deceased, and the administratrix of his estate. The answer ad-

¹Reported in 89 Pac. 885.

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mitted the indorsement of the notes, but alleged fraud of the respondent in obtaining the notes, and also that the guaranty contained on the back of the notes was placed over the blank indorsement of the deceased without notice to or knowledge of the said deceased, and without his consent; that the indorsements in blank were made with the understanding and agreement that said notes were thereby transferred to respondent without recourse upon said Slatter. These allegations were denied by the reply.

At the trial the appellant, who is the widow of the deceased and interested in the estate, was placed upon the witness stand, and after testifying that her husband never transacted any important business except in her presence and with her consent, and that she and her deceased husband were present with John O'Connor when the notes were indorsed, her counsel offered to prove by her that, when her deceased husband indorsed the notes, there was no printed matter or other writing upon the back of said notes or any of them, and that the writing now upon the same was placed there subsequently without the knowledge or consent of said John Slatter or the witness, and generally to prove the allegations of the answer. Counsel stated:

"We do not seek to prove by this witness any statements made to her by the deceased, or any transactions had by the deceased with her; but seek to limit the proof to transactions had by and between the plaintiff John O'Connor and the said John Slatter, and the statements made by the said John O'Connor to the said deceased at that time."

The trial court excluded this evidence upon the ground that the witness was incompetent to testify in her own behalf and, having no other evidence, the court directed judgment for the plaintiff. The question presented is, whether the wife is a competent witness in her own behalf in a case like this.

The statute upon the subject of the competency of witnesses is as follows:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the

action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: *Provided, however*, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: *Provided further*, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action." Bal. Code, § 5991 (P. C. § 937).

The appellant contends that the words "where the *adverse* party sues or defends as . . . administrator" mean that any person may testify in favor of the estate even though he may have an interest or be a party to the record, and that the statute excludes only those witnesses who have an interest and are offered to testify adversely to the estate of a deceased person. The respondent, on the other hand, contends that the words "*adverse party*" are used to mean "*either party*," so that the section should be construed as though it read, Where either party sues or defends, etc., then a party in interest or to the record should not be admitted to testify in his own behalf as to any transaction, etc., with such deceased person.

No statute exactly like ours has been called to our attention by the parties to this appeal, and upon independent investigation we have been unable to find any using the same language in the same order as ours. The authorities from other states upon similar statutes shed very little light upon the question presented here. This statute has been called to the attention of this court in many cases, but in all of them the party presented as a witness has been adverse to the party suing or defending in a representative capacity, and conse-

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quently the question has not arisen as to whether a witness who was an interested party might testify in favor of the estate of a deceased person. In *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812, where the executrix sued to recover land from the defendant, it was held that the defendant was incompetent under the statute, and the court there remarked, at page 425:

"It is clear that plaintiff claimed by, through or from the deceased person, and that consequently the declarations of said deceased person to either party to the record could not be testified to by them."

This would indicate, at least, that an interested party could not be permitted to testify in favor of the estate as to declarations made to him by the deceased. These remarks were not necessary to a decision in that case. In the case of *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, we held that the testimony of Mrs. Sackman was admissible because she was not a party and had no interest in the case. *O'Toole v. Faulkner*, 34 Wash. 371, 75 Pac. 975, is to the same effect. In *Whitney v. Priest*, 26 Wash. 48, 66 Pac. 108, where the action was brought against the estate, we held that the wife of the plaintiff was not a competent witness because of interest. In that case the witness testified in her own behalf adversely to the estate. In *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553, where the action was brought upon certain notes by the successor in interest of a deceased person, we held that the indorser could not be heard to testify that a waiver of demand and notice was not upon the notes when he indorsed them, where the transaction was between the indorser and a person since deceased. Many other cases might be mentioned. But none of these cases are in point upon the exact question now presented.

The statute above quoted is upon the subject of the competency of witnesses. It declares that no person shall be excluded from giving evidence by reason of interest, and then makes certain exceptions by a provision that "where the ad-

verse party sues or defends as executor . . . then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statements made to him by any such deceased . . . person." The words "*adverse party*" in this connection do not refer to parties to the action in the sense of *either party* or *both parties*. "Adverse" as here used refers more particularly to the *one party*, or the opposing party, who may sue or defend in a representative capacity. The use of the word "adverse" is made plain when we transpose the language of the statute and state the declaratory part of the section first, and the condition upon which it was based last, thus: "A party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any deceased or insane person, . . . where the adverse party sues or defends as executor, . . . of any deceased or insane person." Stated thus the statute is plain, and the meaning of the word "adverse" becomes at once apparent.

The statute does not, of course, change the general rule of law that self-serving declarations made out of the presence of the other party are inadmissible. The deceased, if living, could not testify to self-serving declarations made to third parties, nor could his representatives prove such declarations in a case like this, and the appellant expressly disavows any such attempt. The object of the statute was to prevent interested parties from testifying to transactions and statements made by a deceased person when there might be no one to rebut such testimony. From a careful consideration of the language of this statute and the object of its enactment, we conclude that it does not disqualify an interested witness on the part of the estate, and that therefore the wife of the deceased was a competent witness to testify as to what took place between her deceased husband and the respondent in her presence at the time stated.

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The judgment is, therefore, reversed and the cause remanded for a new trial.

FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6519. Decided April 23, 1907.]

MARTHA B. KERSHAW, *Appellant*, v. R. S. SIMPSON *et al.*,
Respondents.¹

TENANTS IN COMMON—PARTNERSHIP—MUTUAL RIGHTS—RIGHT TO ACQUIRE TITLE—LEASEHOLDS. Joint lessees of premises are not co-partners thereby precluding one or more from purchasing the premises at the end of the term without being accountable to a co-lessee, desiring to participate in the purchase, but are rather tenants in common, when no condition or fiduciary relationship existed preventing such action as a matter of good faith or public policy; especially where such co-lessee had always treated her half interest in the lease as a separate entity, and invokes equity to recover an interest in the purchase, and made no offer to participate in the sale or pay her share of the price for three years, during which time the value of the property greatly increased.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered May 12, 1906, upon findings in favor of the defendants, after a trial on the merits, in an action to quiet title. Affirmed.

T. B. McMartin, for appellant.

Black, Kindall & Kenyon, for respondents.

Root, J.—This is an action to have the rights of the respondents to certain real estate in Bellingham decreed to be held in trust for appellant and respondents. From a judgment in favor of the latter, this appeal is prosecuted.

On February 7, 1898, appellant and respondents Simpson and Thomas took from the owners of said property a lease

¹Reported in 89 Pac. 889.

for the term of five years from the 1st day of April, 1898. Said lease provided that, at its termination, the lessees could remove from the premises the improvements made thereupon, in case the lessors did not wish to buy said improvements or re-lease the land to said lessees. On the 1st of September, 1899, the same lessors executed to the same lessees another lease of the same premises for a term of three years from April 1, 1903, and it was recited therein that the same was an extension of the lease theretofore made. In said new lease it was provided that the lessees should not sublet or assign the lease without the written consent of the lessors, and that at the expiration of the lease the lessors might remove the buildings erected thereon according to the terms and conditions of the original lease. Under and pursuant to the terms of these leases, the lessees took possession of, and made valuable improvements upon, the premises.

On or about August 8, 1902, the owners of said premises entered into an agreement with respondents Simpson, Thomas and Lane, by which they agreed to sell to said respondents the property theretofore leased, together with adjoining property in amount about twice that of the leased premises. Appellant knew of this contract at the time it was made, or soon thereafter, but never at any time asked to participate in said purchase, and never tendered or offered to pay any portion of the purchase price. The value of the property has greatly increased since the making of said contract of purchase. The respondents Simpson, Thomas, and Lane having refused to extend the lease and refused to recognize any rights of appellant in and to said premises after April 1, 1906, plaintiff instituted this proceeding.

It is her contention that she and the other lessees were cotenants and copartners, and that the purchase of the demised property by her cotenants without her consent or participation was a violation of a trust and duty owed by them toward her; that the privilege of getting an extension of the lease at its termination was a valuable right of which

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she could not be deprived by her cotenants; that they having purchased the property without her consent and to her injury, as indicated, their said action was inconsistent with the fiduciary relation that existed between them, and that she has a right to have said purchase treated as one made for all of the lessees, and that upon her paying her portion of the purchase price the property should be decreed to have been purchased, and to be now held, for the benefit of all the lessees.

The respondents urged that these lessees were not cotenants or copartners, but tenants in common. It appears that under the lease appellant took a one-half interest, while the other two lessees held the other half. It also appears that the appellant caused her interest in the improvements upon the leasehold estate to be separately insured for her benefit. It would seem from this that she treated her interest as a separate entity, and this would appear to be inconsistent with the idea of partnership property. It is not alleged, nor is there any evidence or claim, that there was ever any partnership agreement other than such as might be implied from the leases mentioned. We do not believe that the leases referred to constitute the lessees a copartnership; nor do we think that the obligations imposed upon one another by copartners, by reason of such relationship, is necessarily imposed upon tenants in a lease of this character. We can see nothing in these leases that would have prevented any one of the lessees from at any time selling or disposing of his interest under the lease, other than the limitation requiring consent from the lessors. There was nothing requiring consent from the other lessees. The lease terminated at a certain date; there was nothing in it requiring the lessors to give an extension. As to whether or not such an extension could be obtained, nobody could tell. It was merely an indefinite, uncertain chance. Any other person than one of these lessees could have purchased the property and gone into possession at the termination of the lease, regardless of the wishes of any

or all of the lessees. This being true, we are unable to see why any one or more of the lessees might not do the same.

It is possible that there might be instances where, on account of the character of the property or of the use which was being made thereof, a condition might exist which would render it bad faith on the part of one cotenant or tenant in common to purchase the demised premises and defeat the opportunity for renewing the lease. It is possible that, under some circumstances, the relationship occasioned by a lease to several tenants, jointly or in common, might create a condition and a fiduciary relationship which should, as a matter of good faith and public policy, be sufficient to prevent any one or more of the tenants from purchasing the leased premises except for the benefit of all. The facts of this case do not place it in that class of cases where one cotenant acquires a title adverse to the leasehold interest. In such a case equity and good conscience forbid that such title should be asserted against the other tenants. But in the case at bar we can find nothing of this character. It would scarcely be contended that the respondent lessees could have compelled the appellant to join with them in the purchase of these premises, or to join with them in an extension of the lease had they desired an extension. Neither could she have compelled them to join with her in the extension of the lease, should she have desired an extension. There is nothing of misrepresentation or deceit in the leases. The rights of all the parties were plainly set forth in the leases. All the parties knew what those rights and privileges were. Appellant knew that there was no certainty or assurance of an extension of the lease after its termination. No attempt was made to interfere with the enjoyment of the leasehold estate during its existence. All of the lessees, including appellant, received full benefits from the use of the property to the time the lease expired.

Appellant, after learning of the purchase of the property by respondents, did not tender any portion of the purchase

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price, although something over three years elapsed from the time she learned of said purchase to the date of the commencement of this action. As this is an action wherein she invokes equity, it was incumbent upon her to show that she had done equity by paying, or promptly offering to pay, her portion of the purchase price.

We think the judgment of the trial court was correct, and it is therefore affirmed.

HADLEY, C. J., CROW, FULLERTON, MOUNT, and DUNBAR, JJ., concur.

[No. 6642. Decided April 25, 1907.]

WILLARD W. HINDMAN, *Respondent*, v. AMBROSE FRED COLVIN *et al.*, *Appellants*.¹

PROHIBITION—GROUNDS—CORRECTION OF ERROR—REMEDY BY APPEAL. Prohibition will not be granted to restrain further proceedings in a foreclosure proceeding, pending an appeal from an order denying leave to an intervener to appear and defend, where the court is not proceeding without or in excess of jurisdiction; as the error, if any, can be corrected on appeal.

MANDAMUS—REMEDY BY APPEAL—SUPERSEDEAS. Mandamus will not be granted to secure a supersedeas on appeal from an order denying an intervener leave to appear and defend a foreclosure action, as no further action can be taken thereon to enforce the order and there is nothing to supersede.

Application filed in the supreme court, February 1, 1907, for a writ of prohibition to restrain the superior court for Thurston county, Linn, J., from further proceeding in a cause pending appeal; also, for a writ of mandate to require the fixing of a supersedeas bond. Writs denied.

Vance & Mitchell and *J. W. Robinson*, for appellants.

W. W. Hindman, for respondent.

CROW, J.—On May 14, 1906, W. W. Hindman, trustee, commenced an action in the superior court of Thurston

¹Reported in 89 Pac. 894.

county against the Great Western Coal Development and Mining Company, a corporation, to foreclose a mortgage on certain coal mining interests, personal property, and leasehold estates of the defendant. The defendant entered its appearance, and one George P. Cragin was appointed and qualified as its receiver, with power to act under the orders of the court. Afterwards Ambrose Fred Colvin, Annie Colvin, his wife, Rose Colvin, and Thomas Colvin, minors, by Thomas Ismay, their guardian *ad litem*, claiming to be lessors of the defendant, with power to forfeit one of the leases mentioned in the mortgage, made an application to the superior court for leave to become parties defendant, or to intervene in the foreclosure action and defend. Upon a hearing, this application was denied, and the applicants have appealed to this court from the order refusing them permission to intervene and defend.

The appellants also requested the judge of the superior court to fix a supersedeas bond on their appeal, and this application was denied. It appears from the record that, since the taking of the appeal, the foreclosure action has proceeded to judgment, and that a decree of foreclosure and order of sale has been entered in favor of Hindman, trustee, which the superior court is about to enforce by execution and sale. The appellants, by motion and affidavit, have applied to this court for an original writ to prohibit the superior court and the judge thereof from taking any further action, pending the appeal, looking towards the enforcement and execution of the foreclosure judgment, and also for a writ of mandamus to require the judge of the superior court to fix a supersedeas bond. Upon the presentation of their original application, a temporary order was issued by this court, directing the judge of the trial court to refrain and desist from further proceedings in the foreclosure action until the appeal could be heard upon its merits, or until the further order of this court. The respondent has demurred to their application.

We fail to see how any writ of prohibition can be granted.

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The superior court has jurisdiction in the foreclosure action, and does not seem to be proceeding in excess of its jurisdiction. If it has committed error in refusing permission to the appellants to intervene and defend, their remedy is by appeal, and they are now proceeding to avail themselves of that remedy. The function of a writ of prohibition is to arrest proceedings without or in excess of jurisdiction, and not to correct errors.

We also fail to understand any theory upon which the appellants are entitled to a writ of mandamus compelling the trial judge to fix a supersedeas bond. The order from which they have appealed simply denied to them the right of intervention and defense. No further action can or will be taken by the trial court in enforcing such order. Hence, there is nothing to supersede. Our statute, Bal. Code, § 6506 (P. C. § 1054), provides that a supersedeas bond when filed "shall operate so long as it shall remain effectual . . . to stay proceedings upon the judgment or order appealed from." No further proceedings can be taken upon the order here appealed from, which simply denied the right to intervene and defend. If a supersedeas bond were to be fixed by the court and given, the appellants could not, during the pendency of this appeal, appear and defend in the foreclosure action.

"The rule obtains in some states that it is only from orders or judgments which command or permit some act to be done, or which are of a nature to be actively enforced against the party, that a stay of proceedings can be had." 2 Cyc. 887.

The rule above quoted follows from a proper construction of our own statute. The writs of prohibition and mandamus are denied, and the temporary restraining order heretofore entered will stand dissolved from and after the date of the filing of this opinion.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, and DUNBAR, JJ., concur.

[No. 8452. Decided April 27, 1907.]

JOHN ELLIOTT, *Respondent*, v. KNIGHTS OF THE MODERN
MACCABEES, *Appellant*.¹

INSURANCE — APPLICATION — MISSTATEMENT OF AGE — FORFEITURE. Where an application for fraternal insurance falsely stated that the applicant was within the age limit, when he knew that he was ineligible, his certificate of membership is void and payments made thereunder are forfeited, where the application declares the statements to be true and the basis of the contract, and expressly provides for forfeiture of payments in case of false statements or suppression of facts.

SAME—KNOWLEDGE OF MISSTATEMENTS. A member in a mutual benefit society cannot avoid forfeiture of his certificate for false representations in his application that he was within the age limit, on the theory that he did not read the application, where he informed the agent that he was ineligible and consented to the agent's "putting him through" in violation of the by-laws, repeated the false statements in an application for reinstatement, and paid assessments many years under a certificate that falsely stated his age.

SAME—NOTICE TO AGENT—FORFEITURE—ESTOPPEL. Notice to an agent or organizer of a mutual benefit society that an applicant was over the age limit and ineligible, under the by-laws, is not notice to the society which would prevent a forfeiture of the membership for false representations as to the age, where it appears that the agent urged the making of the false representations for the purpose of enabling him to complete the organization of a lodge, and agreed that the applicant should have no further trouble; since the same amounted to a conspiracy to defraud the principal, and the applicant had no right to assume that the notice would be communicated by the agent to the principal.

SAME—BY-LAWS—WAIVER—OFFICERS—AUTHORITY. By-laws of a mutual benefit society expressly prohibiting the admission of members over a certain age cannot be waived by the officers of the society.

SAME—RIGHT TO RECOVER PAYMENTS—FRAUD. Where a certificate in a mutual benefit society is void *ab initio* for false statements that the member was within the age limit, assessments paid to the society cannot be recovered, where the contract expressly declares that they shall be forfeited.

¹Reported in 89 Pac. 929.

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Opinion Per Crow, J.

SAME. Recovery cannot be had of assessments paid to a mutual benefit society under a void certificate affording no protection, where the society had done business on the current cost plan, under which the assessments had been disbursed in satisfaction of claims, and the society could not be placed in *statu quo*.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered June 20, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover assessments paid to a fraternal benefit society. Reversed.

Warren W. Tolman, for appellant.

Wiley & Wiley and L. L. Westfall, for respondent.

Crow, J.—The Knights of the Modern Maccabees, a corporation, is a fraternal society, organized on the lodge plan, for mutual protection of its members, upon whom it levies assessments to pay death losses and endowments. Its by-laws provide that all male persons of good moral character, over eighteen and under fifty-one years of age, may be admitted as beneficial members. On November 14, 1890, John Elliott, wishing to become a member of Tent No. 357, then being organized by one F. A. Osborne, a deputy commander at Lake City, Michigan, signed a written application, in which he stated that he was fifty years of age. On February 2, 1891, an endowment certificate reciting his age as fifty years was issued to him for \$2,000, payable at death, or in the event of his living to the age of seventy, to be then payable to him in ten equal annual installments. The certificate provided that it was subject to the conditions, limitations, warranties, and agreements contained in his application.

On November 27, 1891, being suspended for nonpayment of assessments, Elliott made a written application for reinstatement, in which he stated that he was then fifty-one years of age. He was afterwards re-examined and reinstated. At the date of his original application Elliott was, in fact, over

fifty-five years of age. Knowledge of his true age did not come to the society until he was actually seventy years old, when he attempted to collect annually one-tenth of his endowment. On February 15, 1905, he wrote the Grand Commander of the order as follows:

"I was 70 years old on the 13th day of January, but, of course, my certificate shows 65 years old, but the way that comes is this: They started a Tent in Lake City, Michigan, and I went in as a charter member on these conditions that I was to have no trouble hereafter, as I told them that I was too old to join the Order. I told F. A. Osborne, Deputy Commander. He was after me for a week to join. I told him I was too old and he said he would work me in without any trouble if I should go in as they lacked one man and did not know where to get him, so that they could organize the Tent. . . ."

Some correspondence followed, and the society, learning that Elliott was over fifty-five when admitted, refused to receive further assessments from him, and forfeited his certificate, together with all assessments theretofore paid. The forfeiture was declared under the following stipulation, contained in his written application for membership and made a part of his certificate:

"I hereby declare that the above are fair and true answers to the foregoing questions, and I hereby agree that these statements, with this application and the constitution and laws now in force or that may hereafter be adopted, . . . shall form the basis of the contract for endowment; that any untrue or fraudulent answers, and suppression of any facts in regard to my health and age, . . . shall vitiate my beneficiary certificate and *forfeit all payments made thereon*; . . ."

Elliott thereupon commenced this action to recover \$348 paid by him on assessments. He claims that he truthfully stated his age to Osborne, the deputy commander; that he then knew he was not eligible to beneficial membership; that Osborne agreed to work him in, and filled a blank application falsely stating his age to be fifty years; that after giving

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truthful answers to Osborne he, without reading the application, in good faith, signed the same. It is not claimed by Elliott that Osborne, or any officer of the defendant, filled the blank when his application for reinstatement was made one year later, although he denies that he did so himself. The case was tried without a jury, and the trial judge, after making findings of facts and conclusions of law, entered judgment in favor of the plaintiff. The defendant has appealed.

There is not much conflict in the evidence, which shows the facts above stated. The appellant, in support of its assignments of error, contends that respondent knew he was not entitled to beneficial membership; that he not only signed the original application containing a false statement as to his age, but also signed another application for reinstatement, repeating the false statement; that during all the years he paid assessments, he held his certificate reciting that he was only fifty years of age when admitted; that he and Osborne conspired to deceive the appellant into admitting him to beneficial membership, and that his certificate was void *ab initio*, rendering his payments liable to forfeiture.

The respondent contends that, when he stated his true age to Osborne, who was appellant's agent, Osborne's knowledge became its knowledge, and that the appellant, having received the assessments after acquiring such knowledge, is estopped from declaring any forfeiture. Accepting as truthful the respondent's statement that he told his correct age to Osborne, we nevertheless conclude from the evidence that he and Osborne did in fact conspire to defraud the appellant into accepting him as a beneficial member. The general rule in the law of agency is, that notice to an agent is notice to his principal. But an exception to the application of this general rule arises when the agent's conduct is such as to raise a clear presumption that he will not communicate to his principal his knowledge of the fact in controversy, as where he acts in his own interest and adversely to the interest of his principal. 1 Am. & Eng. Ency. Law (2d ed.), 1144, 1145. *Hanf v.*

Northwestern Masonic Aid Ass'n., 76 Wis. 450, 45 N. W. 315. From respondent's statements we must infer that Osborne was acting in his own interest, desiring to secure a sufficient charter membership for organization. Respondent knew this, and had no right to assume that Osborne would communicate his true age to the appellant.

In *National Life Ins. Co. v. Minch*, 53 N. Y. 144, 150, the court said:

"If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal."

We are convinced that respondent participated in defrauding the appellant, for the reasons that the false statement as to his age was repeated in his application for reinstatement; that he knew his age was incorrectly stated in his endowment certificate; and that, when he actually arrived at the age of seventy, he endeavored to secure the annual payments on his endowment, although he had then paid assessments for a period of five years less than his contract contemplated. In both of his applications he declared that all his answers were fair and true, and agreed that his statements therein contained, together with the constitution and by-laws, should form the basis of his contract of endowment. He knew he was fifty-five years of age, and that he could only be admitted to membership by some fraudulent method in violation of the constitution and by-laws. Accepting as true his statement that he did not know Osborne falsely stated his age in the application, he did know that Osborne could only work him in as a member by perpetrating some fraud upon the appellant. The statements as to his age, whether they be regarded as warranties or representations, were material and were conclusively made so by express agreement making the certificate void and forfeiting all payments made thereon

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if they were untrue. Under these circumstances the forfeiture contemplated by the agreement necessarily follows. *Jeffries v. Life Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833; *Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401; *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 South. 288, 59 Am. St. 129; *Ball v. Granite State Mut. Aid Ass'n.*, 64 N. H. 291, 9 Atl. 103; *Co-Operative Life Ass'n. v. Leflore*, 53 Miss. 1; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Bartean v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 595; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. St. 729; *Continental Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810.

The by-laws of the appellant society expressly prohibited the admission of beneficial members over fifty years of age. This provision being intended for the protection of its members was one that could not be waived by its officers. While the authorities hold that certain omissions affecting procedure, such as time of payment of assessments, proof of loss, etc., may sometimes be waived, it certainly is not the rule that officers of a fraternal society organized for the mutual protection of its members can waive a by-law so as to admit persons of a prohibited age and thereby bind the society. 3 Am. & Eng. Ency. Law (2d ed.), 1069. In *McCoy v. Rowan Catholic Mut. Ins. Co.*, 152 Mass. 272, 25 N. E. 289, an applicant made a misrepresentation as to his age, and the question arose as to whether the officers of the society had waived such misrepresentation. The court said:

"But even if the officers of the corporation had attempted to waive the by-laws in this particular, which was of the substance of the contract, we are of opinion that they had no authority so to do. This is a corporation which does not make contracts of life insurance with strangers, but arranges a system of payments for the benefit of the relatives of its deceased members. It adopts by-laws to determine the relations of the members to one another, and also their rights against the corporation. The principles which apply to ordinary mutual insurance companies in regard to the waiver of by-

laws by officers are equally applicable to this corporation. *Bolton v. Bolton*, 73 Maine 299; *Swett v. Citizens' Relief Society*, 78 Maine 541. It is well settled that the officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity. *Hale v. Mechanics' Ins. Co.*, 6 Gray 169; *Baxter v. Chelsea Ins. Co.*, 1 Allen 294; *Mulrey v. Shawmut Ins. Co.*, 4 Allen 116; *Evans v. Trimountain Ins. Co.*, 9 Allen 329; *Swett v. Citizens' Relief Society*, 78 Maine 541. See also *Burbank v. Boston Police Relief Association*, 144 Mass. 494."

Respondent insists that, if his certificate was void *ab initio*, as contended by the appellant, he never had any protection; that his payments were therefore made without consideration, and that he should now be entitled to recover the same. In view of his fraudulent conduct and the express stipulations of his contract, which declared a forfeiture of his assessments for false statement as to his age, this contention cannot be sustained. 16 Am. & Eng. Ency. Law (2d ed.), 954; *Aetna Life Ins. Co. v. Paul*, 10 Ill. App. 431; *Taylor v. Grand Lodge, A. O. U. W.* (Minn.), 105 N. W. 408.

As an additional reason why the respondent should not be permitted to recover, the appellant correctly contends that the parties cannot now be placed in *statu quo*. The appellant is a corporation doing business for the mutual benefit of its members and not for pecuniary profit. While it was receiving the assessments from the respondent, the amounts so collected were all used to pay death and disability claims. Its business was conducted on what is known as the current cost plan. Assessments were only levied upon the membership as needed to pay current death and endowment claims. All the assessments paid by the respondent went into the life benefit fund and were immediately disbursed in satisfaction of the claims mentioned. None of the money paid by him is now in appellant's possession. If it should now refund to him, it would have to do so from assessments collected from many who have become members since the payments were made by him.

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This would be inequitable, unjust, and a misappropriation of funds. The fact that the parties cannot be placed in *statu quo* does not result from any wrongful act of the appellant, but from the wrongful acts of the respondent. Considering the manner in which the business of the appellant has been conducted, and properly construing the contract entered into by the respondent, we conclude that the appellant had a clear right to forfeit the assessments, and that it could not do otherwise under its by-laws, or in justice to its membership.

The honorable trial court erred in entering judgment in favor of the respondent. The judgment is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, DUNBAR, and
RUDKIN, JJ., concur.

[No. 6650. Decided April 27, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Maurice
Thompson, Plaintiff, v. W. H. SNELL, as Judge, etc.,
Respondent.*¹

INSANE PERSONS—COMMITMENT—ACQUITTAL ON GROUND OF INSANITY—STATUTES—APPLICATION. The general statute, Bal. Code, § 2660, providing for inquisitions of insanity, has no application to one acquitted of murder on the ground of insanity; since such case is covered by a special act, Bal. Code, § 6959, requiring the commitment of such person, if dangerous to be at large, which provision is mandatory; and since an insane condition once adjudicated is presumed to continue until the contrary is shown.

STATUTES—REPEAL—REENACTMENT. The repeal in 1873, of an earlier act, is immaterial where the earlier act was reenacted in 1881.

INSANE PERSONS—ACQUITTAL OF CRIME ON GROUND OF INSANITY—IMPRISONMENT—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRESUMPTIONS. One accused of murder, who submits a plea of insanity to trial by jury and is found not guilty by reason of insanity, may be committed to prison if found manifestly dangerous, conformably to Bal. Code, § 6959, and is not deprived of his liberty without due

¹Reported in 89 Pac. 931.

process of law where he does not allege a restoration of sanity; since he was duly accorded a fair trial, and the presumption of insanity once found, continues; and since the law does not prevent a judicial investigation as to restored sanity.

SAME — IMPRISONMENT — PUBLIC POLICY. The commitment to a jail or penitentiary of one acquitted of murder on the ground of insanity, if manifestly dangerous, is not contrary to public policy or the humane spirit of the laws dealing with the insane.

SAME — DANGEROUS CHARACTER — EVIDENCE OF — CONCLUSIVENESS. Acquittal on the ground of insanity is conclusive that defendant is insane, and the fact that defendant killed a man, is conclusive that he is "manifestly dangerous," in the absence of clear evidence that his mental condition has undergone a radical change.

SAME — PRISONS — WHAT CONSTITUTES. Bal. Code, § 6959, providing for the commitment to "prison" of dangerous persons acquitted of crime on the ground of insanity, authorizes commitment to a penitentiary, a county jail, or a hospital.

Application filed in the supreme court February 9, 1907, for a writ of mandate requiring the superior court for Pierce county, Snell, J., to make an examination as to the defendant's sanity after a trial for murder and an acquittal on the ground of insanity; also, for a writ prohibiting the entry of judgment prior to such examination. Writs denied.

Will H. Thompson, for relator.

Kenneth Mackintosh, John F. Miller, Walter M. Harvey,
and *Vance & Mitchell*, for respondent.

Root, J.—Chester Thompson was tried upon a charge of murder for the killing of George Meade Emory. A verdict of "not guilty on the ground of insanity" was returned. Before any judgment was entered upon this verdict, the relator, Maurice Thompson, brother of Chester, filed in the superior court a complaint as follows (omitting formal parts):

"Maurice Thompson, being duly sworn, on oath says, there is in said county an insane person, whose name is Chester Thompson, who, by reason of insanity, is unsafe to be at large (or is suffering under mental derangement), and affiant therefore asks that said person be arrested and taken before

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the superior judge or county commissioners, within said county or district, for examination."

Thereupon the defendant joined in the request that an examination be had as to his sanity or insanity, and demanded a jury to determine the question. He did not, however, allege that he had recovered his sanity, or that he was sane at that time. The prosecuting attorney, by motion and by a "supplemental information," sought to have the trial court enter judgment upon the verdict in accordance with Bal. Code, § 6959 (P. C. § 2208). The court having intimated that it would do so, the relator, Maurice Thompson, applies to this court for an alternative writ of mandate to require that court to have an examination under the provisions of Bal. Code, § 2660 (P. C. § 5546); and the defendant Chester Thompson applies for a writ prohibiting that court from taking any proceedings upon said verdict prior to a hearing upon the question of his sanity or insanity, upon the complaint made and filed by his brother as aforesaid. At the time of the argument here, we made an order directing that the trial court take no further proceedings in the case until the further orders of this court.

Relator contends that the defendant Thompson is entitled to an examination touching the question of sanity or insanity, under the provisions of Bal. Code § 2660. That section reads as follows:

"The superior court of any county in this state, or the judge thereof, upon the application of any person under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, shall cause such person to be brought before him, and he shall summon to appear at the same time and place, two or more witnesses, who shall testify, under oath, as to conversation, manners and general conduct upon which said charge of insanity is based; and shall also cause to appear before him, at the same time and place, two reputable physicians, before whom the judge shall examine the charge, unless the accused, or any one in his or her behalf, shall demand a jury to decide upon the question of insanity.

If such demand be made, the trial shall be by jury. If no jury be demanded, and the said physicians, after a careful hearing of the case, and a personal examination of the alleged insane person, shall certify under oath that the person examined is insane, and the case is of a recent or curable character, or that the said insane person is of a homicidal, suicidal, or incendiary disposition, or that from any other violent symptoms the said insane person would be dangerous to his or her own life, or the lives and property of the community in which he or she may live; and if said physicians shall also certify to the name, age, nativity, residence, occupation, length of time in this state, state last from, previous habits, premonitory symptoms, apparent cause, and class of insanity, duration of the disease, and present condition, as nearly as can be ascertained by inquiry and examination; and if the judge shall be satisfied that the facts revealed in the examination establish the existence of the insanity of the person accused, and that it is of a recent or curable nature, or of a homicidal, suicidal, or incendiary character, or that from the violence of the symptoms the said insane person would be dangerous to his or her own life, or to the lives and property of others, if at large, he shall order such insane person sent to the hospital for the insane. If the trial has been by jury, and the accused declared insane by said jury, and the insanity be of the character above described, the said insane person shall be ordered by the judge to be sent to the hospital for the insane."

In their argument relator's counsel, in speaking of this statute, say: "It covers every conceivable case for the determination of the mental condition of any person in this state. It is a *general* statute, covers all cases," etc. We agree with counsel that it is a *general* statute. It covers all cases not specifically provided for by some other statute. But cases where the defendant has been acquitted of an offense on the ground of insanity, such as the case at bar, are provided for by another statute, Bal. Code, § 6959. It applies specially and solely to such cases. The statute reads as follows:

"When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it

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was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged."

The case of *State ex rel. Mackintosh v. Superior Court of King County*, 45 Wash. 248, 88 Pac. 207, is cited as authority for such an examination as relator demands. The question involved in the case at bar was not in the case cited. In that case two women were being held for trial upon a charge of murder. An affidavit alleging that they were insane was filed with the trial court, which thereupon ordered an examination to be made as to their mental condition. They had not been tried for the crime charged, nor had there been theretofore any determination as to their sanity or insanity. This court held the action of the trial court proper, inasmuch as, under our constitution, as well as under the common law, no person can be put on trial for a capital offense while insane.

But the case at bar is entirely different. Here the defendant, in the trial of the criminal charge against him, tendered the defense of insanity, and established it to the satisfaction of the jury. That he was insane at the time of the homicide has been adjudicated at his instance. It having been established that he was insane at that time, such condition is presumed to continue until the contrary is shown. *In re Brown*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. 868; 22 Cyc. 1115. Hence, it is unnecessary to examine relator's charge that defendant is now insane. His insanity is an adjudicated fact in the case. Having been acquitted upon the ground of insanity, § 6959 applies to his case and is mandatory upon the trial judge. Section 2660 has no application to the case.

It is, however, urged by relator that § 6959 was repealed by § 366 of the probate practice act of November 11, 1873. Section 6959 was first enacted by the territorial legislature

in 1854. It was re-enacted in 1881. Hence, it is immaterial as to whether, as first enacted, it was repealed by the probate act of 1873.

It is also urged that said section was enacted because, at that time, there was no hospital for the insane in the then territory. But this would not account for its re-enactment in 1881, when the territory had such a hospital.

It is further suggested that the statute is unconstitutional, as being in conflict with the state constitution and with the thirteenth and fourteenth amendments to the Federal constitution. The constitutionality of the law has heretofore been affirmed by this court. *In re Brown, supra*.

Finally, it is strenuously urged that, to give this statute effect, is to nullify the humane spirit running all through our laws having to do with those unfortunates who are overtaken by insanity; that it is an anomaly to say that one on trial for murder or one convicted thereof may be examined for insanity, while one acquitted upon the ground of insanity may not have such examination; that the imprisonment of an insane person in a penitentiary or jail is a treatment so drastic as to be inconsistent with our other statutes and general policy of dealing with the insane.

When we remember that there are different types of insanity, and when we reflect that the purpose of caring for the insane involves both a regard for them and for the safety of the public, we cannot say that this statute conflicts with any subsequent statute or any principle of sound public policy. Good reasons readily occur in justification of its enactment. There are occasionally defendants acquitted of murder on the ground of insanity who should, and can, be committed to the penitentiary under this statute. A defendant so committed, or otherwise restrained of his liberty, would have the right, upon asserting a recovery of his sanity, to have the question of such recovery determined by the court.

The statute in question authorizes the committing of a defendant to "prison," if the discharge or going at large of

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such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community. The question is suggested as to what evidence establishes his "manifestly dangerous" condition. The fact of his having killed a human being is conclusive that he was "dangerous;" and the verdict of the jury, that he was insane at the time of the homicide; and unless there is clear, ample, and conclusive evidence that his mental condition has undergone a radical change toward a normal condition since that time, the trial judge should not hesitate to find him "manifestly dangerous" within the meaning of the statute—unless, of course, his physical condition, by reason of sickness, disease, or otherwise, should have rendered him absolutely incapable of doing violence.

The word "prison," as used in the statute, does not mean merely the penitentiary or a county jail. Webster defines the word "prison" as: "A place where persons are confined, or restrained of personal liberty; hence, a place or state of confinement, restraint, or safe custody." The Standard dictionary defines it as follows: "A place of confinement; specially, a public building for the safe-keeping of persons in legal custody," and gives a synonym *inter alia*, "house of detention." The Century dictionary gives this definition: "A place of confinement or involuntary restraint; especially, a public building for the confinement or safe conduct of criminals and others committed by process of law; a jail." We think the word "prison" as used in the statute comprehends the penitentiary, any county jail, and any state hospital for the insane, and that the trial judge may commit to any of these in accordance with the nature of the alleged insanity and the other facts of any given case.

Both applications for writs are denied. The temporary restraining order is dissolved.

HADLEY, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

[No. 6432. Decided April 29, 1907.]

CHARLES L. McDONALD *et al.*, Appellants, v. EDWARD A.
WHITE *et al.*, Respondents.¹

MARRIAGE—EVIDENCE—SUFFICIENCY. A marriage between Indians is sufficiently proven where it appears that a marriage ceremony was performed by a duly licensed minister, and the parties lived together as husband and wife for many years, and upon the wife's death the husband erected a monument over her grave describing her as his wife.

INDIANS — CONVEYANCES — RESTRICTION AGAINST ALIENATION — ESTOPPEL TO ASSERT INVALIDITY. Where a lease for 99 years was made by Indian patentees while there existed a restriction against their alienation of the premises for five years from the date of a patent, the lessors and their heirs and assigns are estopped from questioning the validity of the lease, where they waited before doing so for over twenty years, during which time the lessees and their assigns occupied the premises, paid rent, and made valuable improvements relying on the validity of the lease (RUDKIN, J., dissenting).

APPEAL—RIGHT TO APPEAL—CROSS-APPEALS. A cross-appeal may be taken from any part of a final judgment which is adverse to the claims of the respondent in whose favor the judgment was entered.

Cross-appeals from a judgment of the superior court for Asotin county, Miller, J., entered November 18, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Ben F. Tweedy, Dwight E. Hodge, and Charles L. McDonald, for appellants.

Geo. W. Tannahill, Gose & Rummens, and Eugene O'Neill, for respondents.

Root, J.—This litigation involves the title to a tract of land originally obtained from the government by one Timothy, a Nez Perce Indian. In 1878 Timothy made application at the United States land office at Walla Walla, to file

¹Reported in 89 Pac. 891.

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on said land as a homestead. He made final proof and obtained a receiver's receipt, and subsequently, on April 15, 1884, a patent from the United States government. This patent recited that the land should not be sold or incumbered for a period of twenty years. It seems to be conceded by both parties that this nonalienation clause was erroneous, it being in accordance with the statute of 1881 relating to the Winnebago Indians.

Appellants contend that the patent was issued in accordance with the act of March 3, 1875, and should have had a clause forbidding alienation or incumbrance for the period of five years. Respondents urge that there should have been no nonalienation clause whatever, inasmuch as Timothy had severed his tribal relations and was a citizen of the United States. It appears that Timothy declared his intention May 14, 1877, to become a citizen of the United States. But there is no evidence that he was ever admitted as a citizen by any court or by any authority, other than by operation of law flowing from the fact that he severed his tribal relations and thereby became entitled to the privileges accorded by the United States statutes to such Indians. In making his final proof he testified that he was a citizen and had severed his tribal relations. It seems to have been conceded that, at the time of filing upon this land, he had severed such tribal relations and adopted the habits of civilized life, and that he never thereafter resumed tribal relations. His wife was an Indian woman named Tima. They had four children: He-yoom-ye-it-pilp, or He-yune-yele-ilip-ilip, or Edward; second, Amos; third, Estep-ee-nim-tse-lot, or Young Timothy; fourth, Jane Timoochin. The last-named married an Indian by the name of McBean. They had a child named William McBean, who married a woman named Annie Levi. The issue of this marriage was Cora, who married a man by the name of Jackson. Her interest in the property, herein involved, was deeded to appellant Charles L. McDonald. Young Timothy married a woman named Maggie. They had a child named Amelia, who mar-

ried a man by the name of Bredell. The issue of this marriage was a son called Abraham. Amos, during the lifetime of Timothy and Tima, died unmarried and without issue. Respondents claim that Edward was married twice; that his first wife was Delia, and that to them was born a daughter named Pah-paht-in, who married a man by the name of Wat-tse-tse-kow-en. The issue of this marriage was a girl named Poh-poht-in or Pitts-teen, sometimes called Lilly Cash-cash, who married an Indian named Woh-yoh-tse-kown or Par-kar-la-pykt, sometimes known as Edward Cash-cash; that Edward's second wife was a woman called "New Years;" that the issue of said wife was Nancy Tse-wit-too-e, who married George Waters. To them were born two children, Ellen and Nora, the former marrying one Winniber, and the latter Thomas Hart. Timothy, the original grantee, was a chief of that part of the Nez Perce tribe living on Alpowai Creek. He was also a preacher. He is said to have been instrumental in saving the lives of General Steptoe and his men, and to have participated in the treaty made by Governor Stevens on the part of the government with the Nez Perce Indians. He died in 1890 or 1891, being then some eighty-nine years old. Tima died in 1889, being about ninety-three years of age. Timothy filed upon the land in controversy May 4, 1878, and made final proof in September, 1883. Patent issued April 15, 1884.

On the 19th of June, 1884, Timothy and Tima executed a lease of the land to John M. Silcott, for a period of ninety-nine years from that date. The lease was not acknowledged. Silcott lived with, and, it is claimed by respondent, married Jane Timoochin, after she had separated from McBean, whom she had married as hereinbefore mentioned. On April 1, 1890, Silcott sold and assigned an undivided one-half interest in such lease to one L. A. Porter, and on March 21, 1892, assigned the other half to one Richard Ireland. On March 20, 1902, Silcott deeded the land in controversy to Richard Ireland by quitclaim deed. On October 17, 1903, Ireland and

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wife conveyed the land to respondents, and on the same day assigned to respondents the lease above referred to. On March 19, 1904, said Porter sold and assigned his one-half interest in such lease to W. J. Houser and Ross R. Brattain. On May 6, 1904, Houser and Brattain and wives entered into a contract for the sale of their interest in said lease to respondents. Porter regularly conveyed the fee interest obtained by him to respondents.

It appears to be conceded that, at the time of the trial, respondents were the owners of the lease, and had a contract of purchase for half of the fee of the land subject to the lease; that said contract includes the inheritances of Ellen Winniber, Nora Hart, Pitts-teen or Lilly Cash-cash, and John M. Silcott. Both appellants and respondents assert ownership of the Cora Jackson inheritance. Respondents contend that Ellen Winniber, Nora Hart and Pitts-teen inherited one-third of the fee of this land; that John M. Silcott inherited one-sixth as the husband of Jane Timothy. The appellants dispute all of this. Respondents have a contract of purchase from the grantees of the heirs of Edward, and a deed from said Silcott who, they claim, was the surviving husband of Jane. The interest inherited by Jane passed either equally to said Silcott and Cora Jackson, or to the latter alone, depending upon whether or not Silcott was lawfully Jane's husband. Appellants own the inheritance coming through Young Timothy.

The appellants contend that Silcott was not married to Jane. The evidence shows that there was an actual marriage ceremony performed for these parties in either 1880 or 1881, by Rev. James Hines, a duly licensed minister; but appellants argue that he was not an ordained minister, and that no license had been issued prior to the ceremony. The evidence does not affirmatively show that such a license was issued, nor does it affirmatively show that it was not issued. It is evident that the parties to the marriage were endeavoring to comply with

the law and to fittingly recognize what was proper and right in the matter of solemnizing the marriage. They lived together many years after this ceremony, and held themselves out to the world, and were treated by the community, as being husband and wife, and after her death a monument was erected at her grave with an inscription thereon, wherein she was described as the wife of Silcott, said monument being placed there by him. In view of all the surroundings, we do not think that the trial court erred in treating this as a valid marriage. It is also contended that adequate proof was not made of the marriage of Edward. We think it sufficiently appears.

It is strenuously urged by appellants that the ninety-nine-year lease was absolutely void. This lease was made during the five-year period within which, under the law of 1875, an Indian patentee was without authority to alienate or incumber the land. They contend that it is clear that this law controlled; that Timothy was not a citizen enlisted to an absolute title from the government on making final proof, but that he had his rights under the statutes applying to Indians who had forsaken their tribal relations, and that his patent must be construed as if the five-year limitation was therein contained.

The respondents claim that Timothy's title was absolute, and that he and Tima had the right to sell, convey, or incumber the property in any way they chose. They also maintain that, even if the law of 1875 applied and the lease were consequently void, by reason of laches and an equitable estoppel these appellants cannot question respondents' rights under this lease. There is evidence to show that, after this lease was made, Silcott took possession of the premises, and that he and his assignees have been in possession thereof ever since that time; that they have made many and valuable improvements upon the land; that Timothy and Tima during their lifetime never questioned said lease, and none of their heirs ever did so, and no one else, until the commencement of

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this action. It is also claimed by respondents that Silcott took care of Timothy and Tima during their lifetime after the commencement of said lease, and paid the expenses of their burial, and paid to and expended for them much more than the total amount of the rental of said land for the ninety-nine years. Many of these contentions as to matters of fact are disputed by the appellants, and there is considerable conflict in the evidence touching most of them. We think, however, that it clearly appears that Silcott and those claiming under him occupied these premises from the time of said lease to the commencement of this action without interruption, and that they expended several thousand dollars in improving the same, and that all these things were done with the knowledge of Timothy, Tima, and their heirs through whom these appellants claim; that said parties lived near by and were in a position where they knew of the occupancy of the premises and of the improvements that were going on from year to year.

If the contention of appellants is correct, to the effect that the title of Timothy was taken from the government under the law of 1875, which had the five-year nonalienation provision therein, the lease made during that period would doubtless be void. However, Silcott having taken possession of the premises and having remained until the five-year period had expired, and he and his assignees thereafter continuing to occupy said premises under said lease and to continually improve and spend large sums of money upon said premises, we think, as a matter of equity, that these appellants at this late day are not in a position to question the right of the respondents' possession thereof. The original lessors being Indians and their heirs being mostly Indians, we think much latitude should be accorded them, and that they should be held to have had a liberal allowance of time after the expiration of the five years wherein to take appropriate proceedings to set aside said lease and take possession of the premises if said lease were invalid. But having waited over twenty years

while the lessees and their assigns were occupying and improving the premises and relying upon the validity of said lease, we do not think, as a matter of equity and good conscience, they should now be permitted, when the land has become much more valuable, to step in and oust the respondents.

The trial court found that Timothy and Tima were the owners in fee simple absolute of the land on the 19th day of June, 1884, and were legally competent to execute the lease referred to, and moreover found that, prior to June 15, 1890, the rental had been fully paid for the entire period; that subject to and after the expiration of said lease, the respondents were the owners of a contract of purchase for the undivided one-sixth interest of Pitts-teen, of the undivided one-twelfth interest of Ellen Winniber, to the undivided one-twelfth interest of Nora Hart, and the undivided one-sixth interest of John M. Silcott, amounting in all to an undivided one-half interest. It further found that, subject to said lease and after the expiration thereof, the appellants would be the owners of an undivided one-half of the fee of said land, consisting of the following inheritances: The undivided one-sixth interest owned by Cora Jackson, granddaughter of John Silcott, and the undivided one-third interest descending to and from Young Timothy.

The defendants herein have filed a cross-appeal wherein they seek to review that portion of the trial court's judgment and decree wherein the court found that plaintiffs were the owners, subject to the lease, of the Cora Jackson inheritance in said land. Plaintiffs move to dismiss this cross-appeal on the ground that there is no authority for an appeal of this character in our statute, in that it appears to be an appeal from a part of a judgment and not from the whole thereof, and is consequently not an appeal from the final judgment in an action or proceeding as provided by the statute. We do not think this motion well taken. A party may appeal from the whole or any part of a judgment adverse to him if he con-

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siders the same erroneous, assuming that it is not so connected with the judgment as a whole as to make an appeal from the judgment as an entirety necessary to a proper determination of the issue presented.

The contention of the cross-appellant is that the plaintiff Charles L. McDonald was attorney for the administrator in the settlement of the Timothy estate, and that as such he became possessed of certain knowledge concerning the titles and nature of this property, and stood in a fiduciary relationship toward all of the heirs such as should have prevented him from buying in the interests of any of the heirs. It is urged that his conduct was inconsistent with his duty as attorney for such administrator. There may be, and doubtless are, occasions where it would be against public policy for an administrator to use to his personal advantage information received in the discharge of his duty as such administrator, and the same rule would probably apply to the attorney of the administrator. But in view of all the evidence and facts in this case, we do not believe the trial court was in error in holding as it did with reference to the interest acquired by plaintiffs from said Cora Jackson.

Each party to this action accuses the other of overreaching the Indians with whom they dealt. Plaintiffs claim that the lease for ninety-nine years at \$10 a year was not only invalid but iniquitous and wrong and an imposition upon the poor Indians. Respondents retort that the buying in by plaintiffs of the interest of the various Indian heirs for the small sum of about \$600 was devoid of that honorable treatment to which the Indians were entitled. None of the Indians are parties to this litigation. They all seem to have parted with their interests; whether all legally it is not before the court to determine.

The record in this case is voluminous, and to discuss and analyze the evidence bearing upon the various disputed questions of fact would require more time and space than we think necessary to a decision of the case. Without expressing an

opinion as to the various findings and conclusions made and entered by the trial court, we think its judgment and decree was correct, and it is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting) — The ninety-nine year Indian lease was not executed in conformity with the laws of Washington Territory, was in contravention of the laws of the United States, and was founded upon little more than a nominal consideration. I do not think that there are any equities in the case which would warrant this court in departing from the strict rules of law, and therefore I dissent from the judgment.

[No. 6295. Decided April 30, 1907.]

HARRIET M. DENNEY *et al.*, Respondents, v. THE CITY OF EVERETT, Appellant.¹

LIMITATION OF ACTIONS—TRESPASS—MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE. An action for damages to abutting property resulting from the change of a street grade is not an action for trespass, barred by the statute of limitations within three years, under Bal. Code, § 4800, subd. 1, but is an action for relief not otherwise provided for, limited to two years by Bal. Code, § 4805.

Appeal from an order of the superior court for Snohomish county, Black, J., entered February 19, 1906, setting aside a verdict in favor of the defendant, and granting the plaintiffs a new trial, in an action against a city to recover damages to real property by reason of a change of grade. Reversed.

W. G. McLaren and L. C. Gilman (B. O. Graham, of counsel), for appellant.

Padgett & Bell (Emory, Rourke & Denny, of counsel), for respondents.

¹Reported in 89 Pac. 934.

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Opinion Per CROW, J.

CROW, J.—Plaintiffs, Harriet M. Denney and John C. Denney, her husband, are the owners of an improved lot located at the corner of Hewitt and Lombard avenues in the city of Everett. In the year 1901, the defendant, the city of Everett, established and raised the grade of Lombard avenue along the west side of plaintiffs' lot, for the purpose of constructing an approach to a bridge on Lombard avenue over a railroad track which was located some distance to the rear of plaintiffs' lot and extended east and west substantially parallel to Hewitt avenue. On December 24, 1904, the plaintiffs commenced this action to recover damages alleged to have resulted to their lot by such change of grade. The amended complaint alleged that the change of grade was made between May 13, 1901, and January 20, 1902. The defendant demurred to the amended complaint, for the reasons (1) that it did not state facts sufficient to constitute a cause of action; and (2) that the action had not been commenced within the time required by law. This demurrer was overruled, and the defendant answering denied that the grading had been done between May 13, 1901, and January 20, 1902, or that it had been done at any other time than between May 1, 1901, and November 30, 1901. The defendants also affirmatively and separately pleaded the two-year and three-year statutes of limitations. Upon a trial, the jury returned a verdict in favor of the defendant. The plaintiffs moved for a new trial upon the following grounds: (1) Insufficiency of the evidence to justify the verdict, and that the same was against the law; (2) error in law occurring at the trial and excepted to at the time by the plaintiffs; (3) newly discovered evidence material for the plaintiffs, which they could not with reasonable diligence have discovered and produced at the trial. In support of the third ground of their motion the plaintiffs filed affidavits. Answering affidavits were also filed by the defendant. The motion was denied as to the first ground, but was granted on the second and third grounds therein men-

tioned. From the order setting aside the verdict and granting a new trial this appeal has been taken.

The record shows, and the parties concede, that the jury reached its verdict because it concluded that, under the facts proven, the action was barred by the three-year statute of limitations. The respondents, by their pleadings and evidence, contended that the improvement and grading was not completed prior to January 20, 1902, while the appellant contended that it was completed on or before November 30, 1901, more than three years prior to December 24, 1904, the date of the commencement of this action. The evidence on this issue was in sharp conflict, and the jury evidently determined the same in favor of the appellant. The appellant, by its motions, demurrers, and answers, has at all times contended, and now contends, that the action was barred under the two-year statute, Bal. Code, § 4805 (P. C. § 289a). The respondent concedes that the three-year statute, Bal. Code, § 4800, subd. 1 (P. C. § 285), if justified by the facts, would apply, but strenuously insists that § 4805 has no application whatever. On this question the trial court held with the respondents, and instructed the jury that, if they found the work of regrading had been completed more than three years prior to the commencement of the action, the plaintiffs' right of action would be barred. It being conceded that the work had been completed for two years, and there being a conflict of evidence as to the three-year period, the appellant, by its assignments of error, now contends, (1) that the two-year statute of limitations applies, and (2) that the court erred in setting aside the verdict and granting a new trial.

It being undisputed that the work of regrading had been fully completed more than two years prior to the commencement of this action, the respondents in their brief concede that the action is barred if the two-year statute of limitations, § 4805, *supra*, applies, and that they cannot recover. We think it does apply, and that the act complained of does not

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constitute a trespass within the meaning of subd. 1 of § 4800, *supra*. Trespass upon real property, as used in said section, only contemplates and comprehends a direct physical invasion of the real estate itself. It has no reference to consequential injuries resulting from any act which does not amount to a physical invasion of the property itself. *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298.

As we hold the action was barred under the two-year statute it will be impossible for the respondents to recover upon a new trial, which should not have been granted, the verdict of the jury being right under the law and the evidence. It is apparent that no error was committed by the court during the trial, prejudicial to the respondents. It therefore erred in granting the motion for a new trial. The judgment is reversed and the cause remanded with instructions to deny the motion for a new trial.

HADLEY, C. J., RUDKIN, MOUNT, and FULLERTON, JJ., concur.

[No. 6546. Decided May 3, 1907.]

LUCILE DREYFUS MINING COMPANY, *Respondent*, v. H. S. WILLARD *et al.*, *Appellants*.¹

CORPORATIONS—STOCK—ISSUANCE—FRAUD OF OFFICERS—CANCELLATION OF SPURIOUS STOCK. Where stock purchased on the open market was sent by the buyer to the secretary of the corporation for the purpose of cancellation and reissue, but was fraudulently used otherwise by the secretary, who forged and issued spurious stock in lieu thereof, the corporation is bound by such wrongful issue and is not entitled to have the same cancelled.

SAME—PRINCIPAL AND AGENT. A corporation is entitled to the cancellation of spurious stock wrongfully issued by its secretary, where the original stock came into his hands as a broker before he became secretary, under directions from the owner to take it to the company for reissue, but was otherwise disposed of by him, and the

¹Reported in 89 Pac. 935.

spurious stock was afterwards wrongfully issued after he became secretary; also, where the secretary was authorized to buy stock on the open market and have the same reissued, but instead of doing so he otherwise disposed of the same and fraudulently issued spurious stock in lieu thereof; also, where the secretary individually borrowed money and fraudulently issued spurious stock which he pledged as collateral security therefor; since, as to stock never in the possession of the owners, and as to which the owners dealt with the secretary as their agent, the agent's interest being adverse to that of the company, the company is not bound by the acts of the secretary.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 13, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to cancel an overissuance of corporate stock. Modified.

H. S. Stoolfire and Voorhees & Voorhees, for appellants.

Will H. Thompson and Charles A. Murray, for respondent.

Root, J.—This action was brought by respondent, a corporation, to cancel a large amount of overissued stock held by numerous persons. The appellants Willard and Jamison each appeared in said action and interposed a counterclaim for the amount paid for certificates of such overissue held by him; and appellants Finley and Jamison each interposed a like counterclaim for money loaned upon such certificates, deposited as collateral security by one Kressly, secretary of the corporation. From a judgment and decree adverse to them, each has appealed.

The respondent was incorporated under the laws of this state, with a capital stock of \$50,000, divided into a million shares of the par value of five cents per share, and assessable to an amount equal to par. It was organized for general mining purposes. The stock certificates were transferable on the books of the company by assignment, each certificate having upon the back thereof a blank form of assignment. No restrictions or limitations existed as to officers holding and

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transferring stock. The fraudulent overissue of certificates which occasioned the trouble herein was made by the secretary of the company, one H. J. Kressly. The following articles of the by-laws will show what duties were enjoined upon him as secretary, and indicate the general method of transferring the stock provided for by the company:

"Article III. It shall be the duty of the secretary to keep a record of the meetings of the stockholders and board of trustees. He shall keep a book of blank certificates of stock and fill up and sign all certificates issued; making the proper entries in the margin of said book of said issuance, and have the same properly receipted for when delivered; he shall keep a stock ledger in debit and credit form showing the number of shares issued to or transferred to any stockholder, and the dates of such issuance or transfer; he shall prepare and cause to be published and recorded all reports and statements required by law of the company; he shall keep a proper set of books showing the business of the company and make a statement of the conditions of the company at the annual meeting and shall discharge such other duties as may be prescribed by the board of trustees."

"Article VI. No member of the board of trustees shall receive any compensation for his services as such, nor shall the company be held liable for any services rendered by them. Where a trustee performs the duties of secretary, he shall receive as compensation \$15.00 per month."

"Article IX. The shares of the company may be transferred by the holder thereof, or by any attorney legally constituted, or by his or her legal representatives. The transfers shall be made by endorsing on the back of the certificate of stock, surrendering the same, and the same shall be noted in the proper form on the stock ledger of the company. The surrendered certificates shall be cancelled by the secretary before a new one is issued in lieu thereof, and the certificate so cancelled shall be preserved by the secretary as a voucher. A charge by the secretary may be made for the transfer of stock, not to exceed twenty-five cents for each transfer, when authorized by the board of trustees."

"Article XI. The books and papers in the office of the secretary and treasurer shall, at all times, during business hours, be open to the inspection of the board of trustees or any stock-

holder. The principal office and place of business of the company shall be at Spokane, Washington."

"Article XII. Certificates of stock shall be of such form and device as the board of trustees may direct, and each of such certificates shall be signed by the president or vice president, and countersigned by the secretary, and express on its face its number, date of issuance, the number of shares for which and the persons to whom issued, and shall not be valid before stamped by the secretary with the seal of the company."

Kressly was elected secretary of the company, and entered upon the discharge of his duties as such officer early in December, 1902, and continued to act as such officer until the 1st of June, 1903, during which period all of the fraudulent certificates were issued. The facts appertaining to the appellant Willard were about these: At the time of his election as secretary, Kressly was, and had been for several years prior thereto, a stock broker engaged in buying and selling and handling stock of this and other corporations. After his election he continued his business as such stock broker and maintained his office as secretary of the company in his brokerage office, keeping the books, accounts, certificates of stock, seal, and other property and appurtenances of the office at said place. Appellant Willard was at all times a resident of the State of Ohio. Shortly before Kressly's election as secretary of the company, Willard sent him fifty-five thousand shares of the capital stock of this company, which he had purchased in the open market, and directed that Kressly should take them to the secretary of the company, have them cancelled, and new certificates in lieu thereof issued in his—Willard's—name. Kressly received these certificates of stock, but instead of taking them to the company and having them cancelled and new certificates issued in lieu thereof to Willard, he disposed of them otherwise, and after he became secretary he executed fraudulent certificates in the sum of fifty-five thousand shares, and forwarded those to Willard, who received them under the belief that they were issued in lieu of the

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genuine shares of stock which he had theretofore sent to Kressly to have cancelled and transferred. The stock just mentioned will be hereafter referred to as lot 1.

After Kressly had become secretary of the company, Willard sent him, some time in December or the early part of January, certificates representing seventy-two thousand shares of stock, which he had purchased in the open market, and requested that a transfer thereof be made to himself, the former certificates cancelled, and new certificates, in his name, issued in lieu thereof. Kressly, instead of cancelling the stock and issuing in lieu thereof certificates to Willard, used the stock otherwise and forwarded to Willard seventy-two thousand shares of fraudulent stock; that is, certificates issued for stock over and above the amount allowed by the capitalization of the company, all of the capital stock having been theretofore issued. Willard received these certificates, supposing them to have been issued in lieu of the seventy-two thousand which he had sent in for cancellation and transfer. Subsequent to this transaction, Willard authorized Kressly to buy stock of the company in the open market, in various amounts aggregating seventy-eight thousand shares. The certificates thus purchased or pretended to be purchased by Kressly never came into the possession of Willard, but Kressly at different times sent to Willard new certificates of stock in his—Willard's name—which Willard supposed were issued in lieu of stock purchased, cancelled, and transferred by Kressly.

The appellant Jamison bought overissue stock from Kressly, and paid him therefor \$7,000. He also loaned him \$1,675 and took like stock as collateral. Appellant Finley loaned Kressly \$6,302, and received similar spurious certificates of stock as security therefor. The loans to Kressly by both Jamison and Finley were to him in his individual capacity and not as an officer of the company. The purchases of stock made by Jamison and Willard were not made from the company, as it was known that the company had no stock for sale. All of this stock apparently bore the signature of the

president of the company. It is claimed by respondent that said official's signature was in every instance a forgery, and the trial court so found. We think this finding is correct, although perhaps not material. All of the certificates were signed by Kressly as secretary of the company and were executed upon the usual printed or engraved forms used by the company in issuing its genuine certificates of capital stock. They all bore the seal of the company and appeared upon their face fair and regular. These fraudulent certificates were issued from a stock book which the secretary concealed from the other officers of the company, and by means of the forgeries and the erasure of figures he was able to hide his fraudulent actions for several months.

It is the contention of the appellants that the respondent is liable for the actions of Kressly, upon the ground that a principal is ordinarily liable for the acts of his agent done within the apparent scope of his authority. They contend that, inasmuch as the respondent elected and held out to the world Kressly as its secretary and transfer agent, and intrusted him with its books, stock certificates, seal, and with the duty of making transfers of stock, and authorized him to countersign all certificates of stock issued, they, upon receiving certificates fair and regular upon their face and countersigned by him as secretary, were justified in treating them as genuine, and are authorized to hold respondent liable for the acts of its secretary. It is also urged that the president and other trustees of the company were grossly careless and negligent in that they did not properly supervise the business of the company and the transactions of their said secretary; that had they so done, his fraudulent transactions would have been readily discovered and prevented. We think there is some justification for the strictures made upon these officers of the company; but, while the president and trustees may not have exercised that care and supervision which they should have done, we cannot say from the evidence that such dili-

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gence on their part would have prevented those things of which appellants complain.

We will now consider the appeal of Willard. The first lot of stock which he purchased was sent to Kressly before the latter became secretary. It is, therefore, clear that Kressly's connection with that stock was in the capacity of Willard's agent, and not as agent of respondent. Every certificate of stock recited that it was "transferable only on the books of the corporation by the holder hereof, in person or by attorney, upon surrender of this certificate properly indorsed." Hence Willard employed Kressly as his agent to take that stock and surrender it to the company and upon its cancellation to receive in its lieu certificates in an equal amount. Kressly did not do this. His failure to so do was a breach of his duty as agent for Willard. The corporation is not responsible to Willard therefor.

With the second lot of stock the case is different. Willard had purchased this stock in the open market and was entitled to present it to the company for cancellation and transfer, and to receive in lieu thereof new certificates drawn in his own name. Living in Ohio, he sent the stock to the company for that purpose, or to that particular officer of the company who was charged by its by-laws and practice with the duty of cancelling stock thus turned in and transferring the same by the issuance of new certificates in lieu thereof. The fact that Kressly had been Willard's agent in numerous stock deals and was at the time acting as his agent in various matters appertaining to the purchase of stock would not, in our opinion, make him the agent of Willard in the matter of the transfer of this stock. Willard was entitled to have it transferred by the company. The company, being a corporation, could act only through its officers. Its by-laws imposed this duty upon this particular officer, and when Willard sent the original certificates to that official for transfer, we think he had a right to depend upon his performing that duty as an official of the company, and when he received in return for the deposited

certificates an equal amount of new certificates, fair and regular upon their face, bearing the corporation seal and attested by the genuine signature of the secretary, that he had a right to believe that such certificates had been properly issued by the corporation in lieu of the ones which he had transmitted to it for cancellation and transfer.

As to the third lot, it does not appear that Willard ever had any of those certificates in his possession. He authorized Kressly as his agent to buy the stock, making up that lot, in the open market. Kressly did so, or pretended to do so. Instead of sending Willard the certificates of stock which he so purchased, or pretended to have purchased, he, in effect, represents that he has bought said certificates of stock and cancelled them and issued the new certificates in lieu thereof. As before stated, every certificate recites that it is transferable only upon the books of the company by the holder in person or by attorney, upon the surrender of the certificate. Willard knew that, upon the purchase of any valid stock standing in the name of any other person, he could get the same transferred to himself only by going in person or by his attorney to the company and there surrendering the original certificates for cancellation. He knew that no new certificate could be lawfully issued to him until he or his attorney had deposited old certificates in an equal amount with the company. He, of course, supposed that Kressly had purchased this amount of stock and had delivered it to the company for cancellation, and had received the new certificates in lieu of those so surrendered. But in this he was deceived by Kressly. Kressly, if he ever bought such an amount of stock for Willard, did not surrender the same to the company and have the same cancelled by the company as a basis for the issuance of new certificates which Willard received. Hence, it will be seen that the infirmity of Willard's stock lies in the fact that it was issued without his having deposited for cancellation any certificates—this being a prerequisite to the valid issue of the new certificates which Willard received. Under these cir-

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cumstances Willard cannot be treated as an innocent purchaser. Kressly, in assuming to draft, seal, and issue the new certificates, was guilty of a breach of duty toward the company; but in not depositing with the company for cancellation and transfer the certificates which he had bought, or pretended to have bought, for Willard, he was guilty of a breach of duty as agent of the latter. For this breach of duty Willard and not the company must suffer.

What we have hereinbefore said applies also to the purchase of stock made by Jamison. If he had purchased valid certificates of stock, properly assigned to him, and had taken them to the office of the company and requested that they be cancelled and new certificates issued therefor to him, any neglect or breach of duty in making the cancellation and transfer by Kressly would doubtless have been chargeable against the company. But it does not appear that he ever had the valid certificates in his possession, that he ever saw or had any assignment of such certificates to himself, or that he personally, or by any attorney other than Kressly, ever took said certificates to the company or made any request for their cancellation or transfer. He seems to have purchased, or thought he did, the original certificates from or through Kressly, and relied upon the latter to present the same to the company for cancellation and transfer. The breach of this duty by Kressly was a breach of his duty as agent of Jamison, and the latter cannot hold the respondent liable therefor.

We next come to the consideration of that stock which was pledged by Kressly as collateral security for the loans made to him by Jamison and Finley. It is the contention of these appellants that they had the right to rely upon this stock being genuine, inasmuch as it was fair and regular upon its face and countersigned and issued by the officer authorized so to do, even though the same was made out and issued to and stood in the name of that officer himself. It is a general rule

that a principal is bound by the word or act of his agent spoken or done within the apparent scope of his authority; but to this rule there is a well-recognized exception. It is in those cases where the statement or act of the agent, although within the apparent scope of his authority, is made for his own personal benefit in a transaction between a third party and himself personally, and from which no benefit flows to the principal. Under such circumstances those who knowingly deal with the agent, not as such but in his personal capacity, are not justified in relying upon his self-serving representations and acts, even though they would be within the apparent scope of his authority, if made or done in a transaction wherein he was not known to be the interested party. In other words, where one deals with an agent concerning a matter affecting his personal interest, he is not justified in relying upon the agent's statements and actions as being those of the principal, but must inquire of the principal himself or of some disinterested agent having power to speak for him. The reason of the rule is that the interests of the principal and agent in such a transaction are not one and the same, but are capable of being, and usually are, adverse; and under such circumstances public policy forbids that the temptation to betray the principal should be encouraged by permitting the agent's wrongful acts to work a fraud upon the principal. One dealing with the agent in such a situation without making further inquiry does so at his peril.

The decision of the trial court seems to have been based largely upon the case of *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385. In announcing the opinion of the court, among other things, Mr. Justice Gray said:

"The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moore for stock which she supposed him to hold as his own. She knew that she had not held or

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surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity. . . . This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier."

In the case at bar it is not contended that the respondent corporation received any benefit on account of the spurious stock issued by its secretary, or by reason of any of the transactions involved herein. In the case of *Manhattan Life Ins. Co. v. Forty-Second etc. R. Co.*, 139 N. Y. 146, 34 N. E. 776, the court of appeals of New York said:

"Allen, when he negotiated the loan, was not engaged in the transaction of the defendant's business, or in the discharge of any duty imposed upon him by the defendant. The declarations of an agent are only admissible against his principal when made as a part of a transaction undertaken in behalf of the principal, or in the performance of the duties of his agency. . . . There is a sufficient reason why the plaintiff cannot avail himself of the representations of Allen in regard to the genuineness of this certificate. They were made

in a private and personal transaction, undertaken for his individual benefit, and so understood by the plaintiff. The plaintiff knew that Allen, in the negotiation of the loan, was not acting as the officer or agent of the defendant, or in its behalf, and that his personal interest in the transaction might lead him to betray his principal. It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest. *Stone v. Hayes*, 3 Denio 575; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 423; *Clafin v. Farmers and Citizens' Bank*, 25 N. Y. 293; *Wilson v. Metropolitan etc. R. Co.*, 120 N. Y. 145, 24 N. E. 384; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. 345; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 23 N. E. 109."

In the case of *Farrington v. South Boston R. Co.*, 150 Mass. 406, 23 N. E. 109, 15 Am. St. 222, 5 L. R. A. 849, the supreme court of Massachusetts employed this language:

"The plaintiff cannot rely upon any representations of Reed, because he knew that Reed was acting for himself in borrowing the money and in pledging the stock. The seal of the corporation might well be presumed to be under the control of Reed for the purpose of affixing an impress of it upon the stock certificates, because he was one of the persons who were required to sign certificates of stock, and was the person who had the custody of the certificate and transfer books. The genuine signature of the president of the corporation upon the certificate was the only fact on which the plaintiff had a right to rely; but as the president was not attending personally to the issue of this certificate, it was evident to the plaintiff that Reed might possibly be using for one purpose a certificate signed by the president for another. The certificate was filled up in Reed's handwriting, and nothing whatever was exhibited to the plaintiff tending to show that Reed owned any stock, or that any transfer of stock had been made to the plaintiff by Reed, except the new certificate which was issued to the plaintiff after the bargain between him and Reed had been made. We think that it is a safer and more reasonable rule to hold that a person taking in pledge a certificate of stock, newly issued in his name by an officer of a corporation as security for the private debt of the officer, should be required to investigate the title to the stock, if the officer is

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one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued."

The United States circuit court of appeals for the seventh circuit, in *Lamson v. Beard*, 94 Fed. 30, spoke as follows:

"The power of such an officer to draw drafts of his bank upon others is not greater than his authority to accept the checks or drafts of others upon his bank; yet in that case it was held that the general authority of the president of the bank to certify checks drawn upon it did not extend to checks drawn by himself, and it was declared not to be necessary for the principal in such a case to show that the agent had acted unfairly or that he himself had sustained an injury, but that the act of the agent is deemed to be unauthorized, and the contracts void. We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended, where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well-understood rule. There is, we believe, no good reason to the contrary. . . . It being apparent on the face of the drafts here in question that they were drawn upon the funds of the bank, it was impossible for the plaintiffs in error to receive them in discharge of Cassatt's individual obligations to themselves without being put upon inquiry whether the president had in fact the authority which he assumed to exercise; and it was not enough to make inquiry of him, nor permissible to rely upon the implied representation deducible from the execution of the drafts."

In the case of *Walla Walla County v. Oregon R. & Nav. Co.*, 40 Wash. 398, 82 Pac. 716, a road supervisor was employed by the company to work out certain road taxes. Neither he nor any one did the work, but he issued a certificate, in his capacity as road supervisor, to the effect that the work had been done. Upon this certificate the railway

company drew from the county treasury the amount of cash it had theretofore deposited on account of said taxes. The county brought suit to recover this money. In the opinion of this court the following appears:

"It is urged by appellant that it acted in good faith and that the fraud was on the part of respondent's official, the road supervisor, that said official was the only one authorized to issue certificates; and that, when he did so, appellant had a right to rely upon it. Under some circumstances, the argument would be sound. But its weakness here lies in the fact that this road supervisor was not only an officer of the county in this transaction but he was also the agent of appellant. . . . Ordinarily, an innocent party acting in good faith may rely upon the actions of a public official (except in the exercise of certain governmental functions) within the apparent scope of his authority, and may hold the municipality liable for such acts of its official. But here the appellant is not, in contemplation of law, an innocent party. Thompson was its agent. As such, he knew that the work had not been performed when he executed and delivered the certificate. He knew that he was perpetrating a fraud. A knowledge of all this being possessed by appellant's agent, must, as a matter of law, be imputed to it as principal. Where an official or agent performs, in favor of a certain person, an act which he has no right to do, although it comes within the apparent scope of his authority, his action cannot be held to bind his principal in favor of said person who has knowledge of his lack of authority. In this case Thompson, as road supervisor, had no right to issue a certificate until the requisite amount of work was done. Thompson, as appellant's agent, knew this and knew that the work was not performed, and that the certificate was illegally and fraudulently issued. As appellant's agent, it was his duty to impart this information to his principal. In not doing so, he has caused his employer to suffer as those must who are so unfortunate as to employ unfaithful agents. The certificate in itself has no virtue. The consideration for the refunding of the tax was not the possession of a certificate, but the performance of the work. The certificate was intended merely as the evidence of the work having been done. Within the meaning of the statute, the performance of the work constituted the consideration for the withdrawal of the money. Consequently, when appellant, by

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means of a fraudulent certificate, secured a refund without having performed the road work, it received something for nothing. It acquired money from the county for which it gave that municipality no equivalent. The money, thus paid it, was the fruit of a fraud perpetrated by a man acting in a dual capacity, agent of appellant and official of respondent."

In the case at bar, appellants received certificates for which they gave the corporation no equivalent. They were defrauded by one acting in the dual capacity of officer of the company and agent for the stock purchaser, in transactions appertaining to his personal interests and from which the company received no benefits.

We think the judgment of the trial court must be affirmed, except as to that portion dealing with the second lot of stock purchased by appellant Willard. The issuance of that particular lot of stock by Kressly was a fraud both upon the company and Willard; but the company having placed Kressly in the position of secretary with general authority to issue certificates of stock with all of the attributes necessary to give his act the appearance of a transaction in behalf of the corporation, and there being nothing calculated to put Willard on his guard or to arouse any suspicion in his mind that with reference to said transaction Kressly was not acting properly as the officer of the company, we think, under the doctrine of *respondeat superior*, or principal and agent, that the respondent must be held liable for the damages occasioned Willard in that matter.

The judgment of the lower court is affirmed, except as to the item just mentioned. The case, in so far as it has to do with that matter, will be remanded to the superior court with directions to enter a judgment in favor of appellant Willard for the amount paid by him for the second lot of stock, together with the assessments paid thereon, and legal interest on the sum total to date of judgment.

HADLEY, C. J., MOUNT, FULLERTON, DUNBAR, and RUDKIN, JJ., concur.

Crow, J., took no part.

[No. 6574. Decided May 22, 1907.]

LEOPOLD F. SCHMIDT *et al.*, *Plaintiffs and Appellants*, v.
OLYMPIA LIGHT AND POWER COMPANY, *Defendant*
and Appellant.¹

JUDGMENT—RES ADJUDICATA—IDENTITY OF PARTIES. Where, in an action for the foreclosure of a mortgage upon premises which were subject to a water right, the extent of which was in dispute between the mortgagees and the successors in interest of the grantees of the water right, the judgment of foreclosure, determining the extent of the water right against the claims of the grantees thereof, is not *res adjudicata* as against the original grantor of the water right and his successors, who were not parties to the foreclosure action.

SAME—QUESTIONS DETERMINED. One who acquired title under foreclosure proceedings in which it was adjudged, on the only issue litigated, that the title was subject to a water right, cannot contest the title to the water right, but is conclusively bound by the decree.

ESTOPPEL—DECREE ADJUDGING TITLE—PURCHASE UNDER—NOTICE—ACQUIESCENCE—VENDOR AND PURCHASER—DEEDS. Where the owner of land first conveyed a one-acre tract together with a specified water right, and then conveyed a four-acre tract subject to the water right as described in the prior deed, the record of which was recited, but in the latter deed erroneously described the water as greater in volume than the amount conveyed in the prior deed, and upon foreclosure of a mortgage upon the four-acre tract, the extent of the water right was litigated between the mortgagees and the owners of the water right, and it was adjudged that the four-acre tract is subject to the lesser volume of water as described in the deed granting the same, one who stands by with notice of the foreclosure suit is estopped from afterwards acquiring title to the greater volume of water exempted from the grant of the four-acre tract, as against the purchaser at the foreclosure sale relying upon the adjudication that the land foreclosed was subject only to the lesser right.

VENDOR AND PURCHASER—BONA FIDES—NOTICE. Redemption from a judicial sale of a one-acre tract and a specified water right appurtenant thereto, is not notice to a purchaser of the subservient estate of any intent on the part of the redemptioner to claim a greater volume of water than that described in the grant creating the same, although the grant of the subservient estate excepted such greater volume.

¹Reported in 90 Pac. 212.

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Syllabus.

DEEDS—RESERVATIONS—MISTAKE. Where a deed to a subservient estate reserved a water right as granted by a prior deed, referring to the record thereof, but described as excepted from the grant a greater volume of water than was granted by the prior deed, subsequent deeds in the chain of title to the water describing the lesser volume of water indicate the abandonment or surrender of the greater volume of water, or that the reservation of such greater volume was by mistake; especially where a corrected deed of the water right, made some time after, described only the lesser volume of water.

VENDOR AND PURCHASER—BONA FIDES—NOTICE—DEEDS. Where the owner of land conveyed one acre, with a specified water right, and afterwards conveyed four acres subject to the water right as described in the prior deed, but expressly describing a greater volume of water as reserved to the first grantee, and the successors in interest of the four-acre tract had no notice of an unrecorded lost deed granting the larger volume of water, they are not chargeable with notice that the owner of the one-acre tract claimed the larger volume of water reserved from the grant of the four acres.

ESTOPPEL—BY DEED—ESTOPPEL AGAINST ESTOPPEL. Where two parties claim from the same grantor, and one is estopped by recitals in his chain of title and the other by recitals in his chain of title, the rights of the parties must be adjusted without regard to the estoppel.

VENDOR AND PURCHASER—BONA FIDES—NOTICE—DEEDS. Where a deed conveying a subservient estate, subject to a water right appurtenant to an estate as granted in a prior deed, reference to which deed is made, describes a larger volume of water as reserved than the amount described in the prior grant, and there is nothing of record to show that the greater volume was ever granted, and no one is in possession of the water or using the same, the holder of the subservient estate is not chargeable with knowledge of the existence of any greater right appurtenant to the dominant estate than the volume described in the grant, and the reservation of the greater right in granting the subservient estate must be rejected as surplusage.

ATTORNEY AND CLIENT—AUTHORITY—NOTICE—ESTOPPEL—EQUITY. Where an attorney foreclosed a mortgage upon a tract of land subject to a water right, the extent of which was in dispute, and in litigating the question, suppressed knowledge of a lost unrecorded deed which granted to the defendants the greater water right contended for by them, whereby a decree was entered in favor of the plaintiffs adjudging the premises subject to the lesser water right only, the knowledge of the attorney becomes the knowledge of another of his clients who purchased the lesser right shortly after the foreclosure;

who accordingly would not be entitled to equitable relief to obtain the greater water right as against the purchaser at the foreclosure sale.

APPEAL—RESERVATION OF GROUNDS—DISMISSAL. A cross-appeal based upon a contention not raised in the court below will be dismissed.

COSTS—ON APPEAL. Where appellants claimed more than they were entitled to, but successfully defended against respondent's cross-appeal, the supreme court, on modifying the judgment, will award costs in the court below to the respondents, and the costs on appeal to the appellants.

RUDKIN and DUNBAR, JJ., dissenting.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered August 1, 1906, in favor of the plaintiffs, after a trial on the merits, in an action to quiet title to a water right. Modified.

T. N. Allen, James B. Howe, and Troy & Falknor, for appellants.

Geo. H. Funk, James A. Haight, G. C. Israel, and M. L. Pipes, for respondent.

CROW, J.—This action, which was commenced by Leopold F. Schmidt and Johanna Schmidt, his wife, against the Olympia Light & Power Company, a corporation, to quiet title to a water right, has heretofore been in this court. 40 Wash. 131, 82 Pac. 184. After the case was remanded, the pleadings were amended, and the trial judge, after hearing the evidence, without making findings of fact, entered a decree in favor of the plaintiffs for the larger water right, and other equitable relief. The defendant has appealed, and the plaintiffs have cross-appealed, claiming they were not awarded all equitable relief to which they were entitled. Both parties having appealed, we will refer to them as plaintiffs and defendant. By the decision of this court on the former appeal it was determined that the trial court had erred in sustaining the defendant's demurrer to the amended reply and in entering

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judgment upon the pleadings without the introduction of evidence. The case is now before us on amended pleadings for trial *de novo*, and we deem it necessary to make a more complete statement of the facts as we find them from the evidence.

The plaintiffs own a certain one-acre tract of land in Thurston county, which lies contiguous to, and in a northeasterly direction from, a certain four-acre tract owned by the defendant. The plaintiffs claim that, as owners of the one-acre tract, they are also owners of an easement in the four-acre tract, consisting of a perpetual right to take from a dam across the Des Chutes river, located upon the four-acre tract, a column of water twenty inches deep, four feet and seven inches wide, and running with a velocity of five hundred and twenty-two feet per minute, together with a right of way for a water flume to conduct the water over the four-acre tract to the one-acre tract. This column of water will hereafter be referred to as the "greater water right." In the original amended answer the defendant denied plaintiffs' right to the greater water right, but in substance admitted that they did own the right to a column of water three feet by one foot, which will hereafter be referred to as the "lesser water right." On the former appeal, the issue raised by the pleadings was whether plaintiffs were entitled to the excess of the greater over the lesser water right, and the case was remanded for further proceedings not inconsistent with that opinion, which would require a trial of that issue on the merits. For a complete understanding of the facts as now presented, a separate statement of the title to each tract becomes necessary, both being deraigned from Clanrick Crosby, Sr., and his wife, common grantors.

THE ONE-ACRE TRACT. On April 11, 1863, Clanrick Crosby, Sr., and Phebe Crosby, his wife, by deed, conveyed to C. Crosby & Company, a copartnership, a certain piece of land eighty by one hundred and fifty feet, on which a new grist mill was then being erected, with the right to "all the water power that may be drawn from the pond by a gate from

the Des Chutes river three (3) feet wide by one (1) foot deep." This deed was recorded in volume 5 at page 96, records of deeds for Thurston county, the land conveyed being the one-acre tract. Subsequently a correction deed, hereinafter mentioned, and describing the land by metes and bounds, was executed, but without changing the description of the water right. The title to the one-acre tract passed by mesne conveyances to A. H. Chambers and Robert Frost, who held the same from July 9, 1891, until April 29, 1895, when they conveyed to one D. J. Chambers, now deceased. While A. H. Chambers and Robert Frost held the title, numerous judgments were entered against them and became liens on the one-acre tract. Early in 1899, T. N. Allen, as trustee for the judgment creditors, by judicial proceedings, obtained a sheriff's sale to enforce their liens, and on May 6, 1899, purchased the one-acre tract, obtaining from the sheriff a certificate of sale. On March 4, 1896, D. J. Chambers, who held the record title, died intestate. On April 21, 1900, the plaintiff Leopold F. Schmidt obtained a quitclaim deed from the executors, representatives, and legatees of D. J. Chambers, deceased. On May 1, 1900, he redeemed from the sheriff's sale, terminating the right of Allen, trustee, under his certificate of sale, and obtaining the complete title. It will thus be seen that the plaintiffs deraigned their title from Clanrick Crosby, Sr., and wife, under the original deed of April 11, 1863, which granted the lesser water right. A careful examination of the entire record fails to show any deed, mortgage, or other instrument in the chain of title to the one-acre tract, which creates, suggests, or gives notice of any greater water right, although several instruments appear specifically describing the lesser right by the dimensions of three feet by one foot.

THE FOUR-ACRE TRACT. On May 18, 1870, Clanrick Crosby, Sr., and wife, parties of the first part, conveyed to the Washington Water Pipe Manufacturing Company, a corporation, hereinafter referred to as the "pipe company," the

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four-acre tract by metes and bounds, the description being succeeded by the following language:

"Subject, nevertheless, to the grants of water power heretofore made by the said parties of the first part within said described boundaries; that is to say, for the said flouring or grist mill of C. Crosby, heretofore described as 'Crosby's new grist mill,' a volume of water twenty inches deep, four feet seven inches wide, and running with a velocity of five hundred and twenty-two (522) feet per minute, which water power was granted by deed of C. Crosby and wife to C. Crosby & Company, recorded in office of the county auditor of Thurston county, in deed records Vol. 5, p. 96."

The deed to which reference is made conveyed only the lesser water right. By mesne conveyances the title to the four-acre tract passed from the pipe company to D. B. Finch, who, on February 10, 1892, conveyed it to A. H. Chambers and Robert Frost, by deed containing the same recitals of the greater water right with reference to the deed as recorded in volume 5, page 9, for its origin. On the same date, Chambers and Frost, joined by their respective wives, executed and delivered to D. B. Finch a purchase-money mortgage on the four-acre tract for \$15,000, the mortgage reciting that it was "subject, however, to the two grants of water power within the said described boundaries, the first to the flouring or grist mill of C. Crosby, by deed recorded in deed records Vol. 5, page 96, in the office of the county auditor of Thurston county; the second to Biles & Carter, by deed dated April 9, 1859, and recorded in the auditor's office, deed records Vol. 4, page 64." The last-mentioned Biles & Carter water right is not in issue in this action. This mortgage was by mesne conveyances transferred and assigned to J. B. Richardson and L. E. Kelly, trustees, who by one George H. Funk, their sole attorney, on February 28, 1899, commenced an action in the superior court of Thurston county to foreclose the same. In this action A. H. Chambers and Robert Frost, their respective wives, numerous creditors, and T. N. Allen, trustee, were defendants. All defendants except Allen defaulted.

None of the executors, legatees, or representatives of the estate of D. J. Chambers, deceased, were parties. A *lis pendens* notice was filed on March 12, 1899. T. N. Allen, trustee, who held a sheriff's certificate of sale to the one-acre tract, filed an amended answer, in which he contended that the one-acre tract was entitled to the greater water right which was a burden upon the four-acre tract. The allegations on which this contention was based were denied by the reply, the plaintiffs alleging that the one-acre tract was only entitled to the lesser right appurtenant thereto. The dimension of the water right was the only issue tried. On February 23, 1900, this issue was on trial determined in favor of the plaintiff mortgagees, who contended for the lesser water right. Foreclosure decree was entered, reciting that the four-acre tract was subject to the lesser right only. Sale was made on April 14, 1900, at which Richardson and Kelly purchased the four-acre tract, receiving a certificate of sale therefor, which on June 1, 1900, they assigned to L. B. Faulkner, trustee, he being the manager of the defendant, the Olympia Light & Power Company; and he on February 19, 1901, assigned to the defendant. On July 6, 1901, a sheriff's deed was executed and delivered to the defendant as such assignee.

The above constitutes a brief outline of the record title to the two separate tracts. About May, 1899, during the progress of the foreclosure proceedings, George Funk, attorney for the plaintiffs, received by mail from Mr. Richardson, one of his clients, a pen and ink copy of what purported to be an unrecorded deed from the pipe company to W. F. Crosby. The supposed original deed, which is shown to have been lost, and will hereinafter be mentioned as the "lost deed," was dated May 20, 1874. It recites the original deed of May 18, 1870, from Clanrick Crosby, Sr., and wife, to the pipe company, its reservation of the greater water right, the fact that it had omitted granting or reserving to C. Crosby, Sr., by express terms, a right of way over the four-acre tract for a flume, or to reserve to him the right to enter upon the four-

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acre tract to repair or construct the flume. It then confirmed the larger water right by express dimensions, and granted a right of way to W. F. Crosby, with the privilege of going upon the four-acre tract to construct or repair the flume. Mr. Funk received this pen and ink copy prior to the trial of the foreclosure action then being prosecuted by him. He made a typewritten copy of the pen and ink copy, and returned the latter to Mr. Richardson on May 24, 1899. Mr. Funk did not disclose his knowledge of this copy to any person until he communicated the fact of its existence to the plaintiff, Leopold F. Schmidt, who was one of his clients. He and Schmidt both claim that he made such communication after Schmidt had purchased, paid for, and redeemed the one-acre tract. Schmidt in this action now relies upon this lost deed to show the enlargement of his water right from the lesser right originally created by the Crosby deed of April 11, 1863, to the greater right now claimed by him. Their statements as to when Funk told Schmidt of the lost deed are not contradicted by any witness. The record, however, indicates that Funk, while acting as attorney for Richardson and Kelly, was also representing Schmidt who was obtaining title to the one-acre tract.

On April 14, 1900, the sheriff's sale was made in the foreclosure suit. On May 2, 1900, Schmidt's quitclaim deed of April 21, 1900, from the representatives of D. J. Chambers, deceased, was filed for record by Funk. Schmidt redeemed from the Allen certificate of sale on May 1, 1900. His certificate of redemption was filed for record by Funk on May 2, 1900. Order of confirmation of the sheriff's sale in the foreclosure proceeding was made on May 21, 1900, on motion of the plaintiffs. Schmidt testified that Funk had been his attorney for some time; that before he bought the quitclaim deed he had obtained from Crosby & Company an old abstract of title to the one-acre tract, which he showed to Funk; that Funk gave him a verbal opinion, but on cross-examination Schmidt evaded all efforts of defendant's counsel to ob-

tain from him a statement of that opinion, and finally testified that he acted on his own knowledge which he obtained from the abstract itself and from other sources, in concluding that the one-acre tract was entitled to the larger water right. When asked to show any transfer in the abstract mentioning the larger water right, he was unable to do so, and his counsel admitted that it did not mention such larger water right. He denied any knowledge of the adjudication contained in the foreclosure proceedings. Mr. Funk at first testified that, according to his recollection, he received the pen and ink copy of the lost deed after the foreclosure suit had gone to judgment, and while sale was being made; but upon being pressed to further examine his correspondence, he discovered his letter of May 24, 1899, in which he had returned the pen and ink copy to Mr. Richardson, showing that he must have received it some eight or nine months prior to the trial. It is possible that he may have been equally at fault in his recollection as to when he first told Schmidt of the existence of the copy of the lost deed. Schmidt tries to avoid notice to himself of the foreclosure proceedings, or of the copy of the lost deed in Funk's possession at all times prior to the purchase made by him; but his evidence on this point does not seem entirely definite or satisfactory. Considering all the evidence in the light of surrounding circumstances and his own actions, we incline to the view that he was mistaken, and that he did learn of Funk's copy of the lost deed and of the adjudication in foreclosure proceedings prior to his purchase. However, for the purposes of this opinion, we will assume that he did not have actual knowledge of the latter.

In this action the defendant, by its second amended answer, made since the former appeal, pleaded the adjudication of the water right in the foreclosure suit, and claiming that the plaintiffs occupied a position of privity with T. N. Allen, trustee, insisted that the existence of the lesser right and non-existence of the greater right have, as against the plaintiffs, become *res adjudicata*. To this defense the trial court sus-

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tained a demurrer interposed by the plaintiffs. The defendant now contends that the trial court erred in sustaining this demurrer, insisting that the decree of foreclosure is *res adjudicata* against the plaintiffs. This contention cannot be sustained, for although the plaintiffs redeemed the one-acre tract from Allen, trustee, they only deraign title from their grantors, the representatives of D. J. Chambers, deceased, who were not parties to the foreclosure action. After redemption the D. J. Chambers estate, and its grantees were in the same position they would have occupied had no certificate of sale been issued to Allen. *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795. Although we hold that the foreclosure proceedings were not *res adjudicata* as against the plaintiffs, we will, as they are fully shown by the evidence, hereafter consider the same in further discussing the relative equitable rights of the parties.

W. F. Crosby, the grantee in the lost deed, has given his deposition in which he testified that the lost deed was executed and delivered on May 20, 1874, by Samuel W. Percival, president of the pipe company; that it was witnessed by Elwood Evans, and Charles Wood, that it was acknowledged before Elwood Evans a notary public; that Evans was his attorney; that on Evans' advice he did not record the deed, on account of pending litigation; that Percival and Evans have both been dead for many years; that the deed was placed in the safe of Crosby & Company; that Charles Wood, the other witness, cannot be accounted for; that W. F. Crosby has for many years past lived in California or Oregon; that after diligent search he has been unable to find the original deed, and that the copy made by Funk from the pen and ink copy is a true and correct copy. His brother, Walter Crosby, now living in Olympia, testified that he remembered the lost deed, seeing it in the safe of Crosby & Company at Tumwater, and that he last saw it in 1880. A. H. Chambers testified, that about 1874 he knew there was some question about the right of

W. F. Crosby to go upon the four-acre tract to construct or repair the flume; that he knew the dispute was settled; but he knew nothing of the lost deed. Robert Frost testified that several years since he received from D. B. Finch, former owner of the four-acre tract, and a nonresident for whom he was agent, a letter making some indefinite reference to an unrecorded deed, and that the letter was lost. Frost, however, knew nothing of the contents of the deed. This is the substance of all evidence of any knowledge of the lost deed by any persons whomsoever. It is not shown that the defendant, its manager Faulkner, or any of its agents or officers, had any knowledge or notice of the unrecorded lost deed, or any copy thereof, prior to the commencement of this action or prior to their purchase of the four-acre tract.

Since the former appeal, the defendant, by its second amended answer, further pleaded an abandonment by plaintiffs' grantors of the lesser water right to which they were formerly entitled, and now asks that the same be determined in this action. The defendant is in no position to make this contention. It admitted the lesser right in its amended answer prior to the former appeal. It also knew of the adjudication in the foreclosure suit that the plaintiffs' grantors, then represented by Allen, trustee, were entitled to the lesser right. The only contested issue in that action was the difference in quantity between the two rights. The defendant obtained title under that foreclosure proceeding, and it is conclusively bound by the adjudication that the owners of the one-acre tract are entitled to the lesser right.

The evidence shows that water in some quantity was used by the flour mill for many years, and afterwards by a shingle mill and other mills, on or below the one-acre tract. It is not entirely clear as to how much water was used. The plaintiffs claim the entire greater water power was utilized. It does appear, that after the year 1896 or 1897, the use was entirely abandoned; that the flume decayed, went out, and was de-

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stroyed, and that at the time the defendant obtained title it was not being used by any person.

The defendant now contends, that the plaintiffs have not obtained any title to the greater water right; that they are not pressing their claim in good faith; that they bought with actual notice of the adjudication in the foreclosure proceedings; that they have not deraigned the greater right by any record title from the United States; that they cannot claim title under the lost deed as against defendant, as it was never recorded and no notice thereof to the defendant has been shown; that Mr. Funk who represented the plaintiffs Richardson and Kelly in the foreclosure suit, concealed the deed from the court in the trial of that action; that thereafter he placed a copy of the instrument in the possession of the plaintiffs in this action; that he at no time disclosed to the defendant the existence of the unrecorded deed; that those acts show lack of good faith upon the part of the plaintiffs; that the records through which the plaintiffs deraigned title show that the easement appertaining to the one-acre tract was the smaller easement only; that outside of the unrecorded deed, notice of which was never brought to the attention of the defendant, there was no conveyance of any larger easement, and that no rights to any larger easement have been established by prescription, adverse user, or otherwise. On the other hand, the plaintiffs contend that the defendant is estopped from denying their title to the greater right by reason of the recitals contained in the recorded deeds constituting defendant's chain of title, and especially by reason of the recitals of the deed of May 18, 1870, from Clanrick Crosby, Sr., and wife to the pipe company.

Peculiar conditions are shown by the record: (1) The plaintiffs are compelled to go into the chain of title to the four-acre tract to obtain any evidence or record notice of the existence of the alleged greater water right as appurtenant to the one-acre tract; (2) All deeds affecting the four-acre tract which mention the greater right do so by recitals only,

but also refer to the original deed of April 11, 1863, to the one-acre tract, recorded in volume 5, at page 96, for the origin of the right. The latter deed grants the lesser right only; (3) The holders of title to the four-acre tract refer to the record title to the one-acre tract to show that the water right actually created, existing, and appurtenant thereto is the lesser right only. The situation appears to be that in every instance the one party refers to the record chain of title of the other party to sustain his own contention. On the former appeal, when we construed the pleadings only, we said: "A party cannot rely on so much of a public record as is favorable to his contention, and close his eyes to the remainder." The existence of the lost deed was not shown or mentioned on the former appeal; nor were the record titles to the two several tracts disclosed as they now appear. Under the facts now presented by the evidence, the rule above announced should be applied to the plaintiffs as well as the defendant.

The plaintiffs claim that they have obtained a quitclaim deed; that they have redeemed from Allen, trustee, and that they did so without knowledge of the copy of the lost deed held by Funk. If they then had any record basis for their claim to the larger right, they must have found it in the chain of title to the four-acre tract, as it nowhere appeared in their own chain of title to the one-acre tract. Here we find a servient and a dominant estate, which seem to be dependent in the matter of their titles the one upon the other. A person in making an examination of the title to the water right appertaining to the dominant estate was compelled to look into the title to the servient estate to find any suggestion of the greater right. If the plaintiffs could only find evidence of the creation and existence of the greater right in the title to the servient estate, they should have examined that title down to the date of their purchase of the dominant estate. Had they done so they would have found a *lis pendens* notice of record, advising them of the foreclosure proceedings in

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which judgment had been entered, declaring that the dominant estate in the one-acre tract only had appurtenant thereto the lesser right which was a burden on the servient estate or the four-acre tract. We hold that, under these peculiar circumstances, they should have taken notice of the foreclosure proceedings, because of the dependent character of these titles, coupled with the further fact that no water right whatever was then in use, and it devolved upon them to ascertain whether it had been surrendered, released, or abandoned to or in the servient estate. They knew they could not establish the greater right from the record chain of title to the one-acre tract, the dominant estate. Had they taken notice of and examined the foreclosure proceedings, they would have obtained actual knowledge that the defendant's grantors were obtaining title to the four-acre tract in good faith for a valuable consideration, relying upon an adjudication that it was subject only to the lesser water right. Having failed to do this, they should now be estopped from claiming the greater water right, unless they can show that the defendant had actual notice of the unrecorded lost deed or knowledge of facts sufficient to put it upon notice. This they have utterly failed to do.

The plaintiffs, however, claim that, on May 1, 1900, they redeemed the Allen certificate; that Faulkner, the defendant's manager, knowing this fact, did thereafter, on June 30, 1900, accept an assignment of the certificate of sale to the four-acre tract; that he did so with notice of the redemption, and of the plaintiffs' claim to the greater water right. We do not think this contention can be sustained. Faulkner purchased from the original holders of the certificate of sale, who bought on April 14, 1901, prior to any redemption being made by the plaintiffs. In any event, he was entitled to presume that the plaintiffs were redeeming for the purpose of securing title to the one-acre tract with the admitted lesser water right appurtenant thereto. He could then purchase the four-acre tract, thinking he would obtain all of the water

power, subject only to the lesser right. We fail to see how his knowledge of the redemption by plaintiffs constituted notice sufficient to inform the defendant that the plaintiffs were then claiming a greater easement than the lesser water right. From the facts then known it could have been readily presumed that the plaintiffs were purchasing the lesser right, and that the defendant was obtaining the four-acre tract and the remaining water power, subject to such lesser right only.

The original deed from Clanrick Crosby and wife to the pipe company, which the plaintiffs say should have put the defendant on notice, was executed on May 18, 1870. This date becomes material. No other instrument originally indicating the existence of such greater right can be found of record in either chain of title, although this instrument was thereafter mentioned in subsequent deeds to the four-acre tract. It appears that subsequent to the date of this deed, the following instruments were recorded in the chain of title to the one-acre tract, and again recite the lesser water right by the dimensions of one foot by three feet.

Deed from William Billings, sheriff, to C. Crosby, dated March 11, 1874, and filed June 10, 1874, on the one-acre tract.

Deed from Clanrick Crosby, Jr., executor of the estate of Zenas Crosby, deceased, to Clanrick Crosby, Sr., dated July 27, 1865, filed June 10, 1874, on the one-acre tract.

Deed from Clanrick Crosby, Sr., to William F. Crosby, dated May 15, 1874, filed May 20, 1874, on the one-acre tract.

Deed from Nathaniel Crosby, Jr., to William F. Crosby, dated May 1, 1874, filed July 27, 1875, on the one-acre tract.

Mortgage from Clanrick Crosby, Sr., to Marshall Blinn, dated May 15, 1874, filed May 15, 1874, on the one-acre tract.

These instruments were all recorded after the record of the deed of May 20, 1870, and four of them were executed after that date. In two of them William F. Crosby was

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named as grantee. It will be noted that he was named as grantee in the lost deed, executed about the same time, to confirm the greater water right, and that these two deeds running to him recited the lesser water right by specific dimensions as being three feet by one foot. These deeds in the plaintiffs' own chain of title indicate either that the greater right had been abandoned or surrendered, or that the deed of May 20, 1870, from Clanrick Crosby, Sr., to the pipe company, was erroneous in stating by dimensions that the greater right had been reserved, and that it correctly referred to the deed of April 11, 1863, which originally created the lesser right. There is another peculiar feature of the plaintiffs' title to the one-acre tract. The original deed of April 11, 1863, creating the lesser right, did not describe the one-acre of land conveyed by metes and bounds. On March 19, 1873, a correction deed was executed by Clanrick Crosby, Jr., Martha F. Crosby, George W. Biles, P. L. Biles, J. H. Naylor, Cecilia Naylor, W. F. Crosby, Walter Crosby, and Fanny Crosby, successors in interest to Clanrick Crosby, Sr., and Phebe Crosby, his wife, then deceased. It definitely described the one-acre tract by metes and bounds. This correction deed was of later date than the deed of May 20, 1870, from Clanrick Crosby, Sr., to the pipe company upon which the plaintiffs now rely for notice to the defendant, but this correction deed, although carefully drawn, utterly fails to make any correction as to the dimensions of the water right appurtenant to the one-acre tract, although at that date there nowhere appeared in the chain of title to the one-acre tract any suggestion or hint that the greater right had been created. This would again indicate that the deed of May 20, 1870, to the pipe company, was erroneous in reciting the larger right by dimensions. This correction deed was filed for record on June 10, 1874, after the execution of the alleged unrecorded lost deed creating the greater water right.

Another circumstance appears from the record. It will be remembered that the unrecorded lost deed was executed by

the pipe company on May 20, 1874. Nearly two years prior to that date, the pipe company on July 29, 1872, had mortgaged the four-acre tract to one D. B. Finch. This mortgage was foreclosed in an action in which W. F. Crosby, the grantee in the lost deed, was not a party; but as his deed was not recorded, he was, in the absence of any showing of knowledge in the mortgagee, bound thereby. Foreclosure decree was entered on October 2, 1874. Sale was made under the decree, and on November 24, 1876, the sheriff of Thurston county executed and delivered a deed to D. B. Finch. This foreclosure and sale related back to July 29, 1872, the date of the mortgage. As the lost deed thereafter executed by the mortgagor had never been recorded, and as it nowhere appears that Finch, the mortgagee, and the plaintiff and purchaser in the foreclosure proceeding ever had any actual or constructive notice of the lost deed, all rights granted by such lost deed have ceased and have been determined as against Finch, and all parties thereafter holding under him, including the defendant. No attempt has been made to show that Finch, prior to the foreclosure sale, had any notice of the unrecorded lost deed.

If the defendant is estopped by the recitals in its chain of title, the plaintiffs are also estopped by the recitals in their chain of title.

"An estoppel against an estoppel, as Lord Coke says, setteth the matter at large. According to this rule no one can set up an estoppel by deed against the estoppel arising from his own grant. In the same way, the setting up of an estoppel by deed may be prevented by an estoppel *in pais* as against the grantee." 11 Am. & Eng. Ency. Law (2d ed.), 392.

An estoppel against an estoppel sets the matter at large. Thus, if both parties claim under the same person, and one is estopped by one deed and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the rights of the parties are to be adjusted without regard to any estoppel. *Carpenter v. Thompson*, 3 N. H. 204, 14 Am. Dec. 348.

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Coming now to the question of notice to the defendant, let it be assumed that it had sufficient notice from the recitals in its chain of title to put it on inquiry. What would it have found as the result of such inquiry? It might have gone through the entire record of all instruments constituting the chain of title to the one-acre tract, the dominant estate, and it would only have found the lesser right created, mentioned, or suggested. It would have been unable to find in either chain of title any instrument of record actually creating the greater right, but would have found deeds to the one-acre tract, subsequent to the deed in its own title, giving the supposed notice, which subsequent deeds again and again recognize and by express description giving measurements, convey the lesser right, of three feet by one foot, as appurtenant to the one-acre tract. The lost deed could not have been found. The only party to it then surviving lived in another state. An examination of the property would have shown that none of the power was being used by any of the plaintiffs' grantors, or any one claiming under them, or that it was being utilized by any person whomsoever in any quantity whatsoever. The flume had gone out, had rotted away, and nearly disappeared. No one was in actual physical possession or occupancy of either the greater or the lesser right. In the foreclosure proceedings an attempt to establish the greater right as appurtenant to the one-acre tract, made by T. N. Allen, trustee, then holding under the plaintiffs' grantors, had failed. Where else could the defendant go to obtain knowledge of any greater right, or where could it go to obtain a quitclaim deed for any such supposed outstanding right? The record fails to show facts sufficient to constitute notice to defendant or to cause it to make any greater or more diligent inquiry than it did make, or which would lead to an actual knowledge of the existence of the alleged greater right.

Actual notice to the defendant being eliminated, the plaintiffs' contentions, simply stated, are (1) that the greater

water right was granted and confirmed by the lost deed executed on May 20, 1874; (2) that the recitals in the original deed of May 18, 1870, from Clanrick Crosby, Sr., and wife to the pipe company, and subsequent deeds on the four-acre tract referring thereto, gave notice to the defendant and its grantors of the greater right. How could the deed of May 18, 1870, be notice of the contents of another deed not then in existence but executed four years later? Yet this is the plaintiffs' position, for they are compelled to rely exclusively on the later deed as the instrument that increased the lesser water right to the greater and confirmed the greater. The previous deed of May 18, 1870, was concededly erroneous either in reciting the larger water right by dimensions, or in referring to the deed of April 11, 1863, as the instrument which made the original grant. If the reference to the deed last mentioned was erroneous, then there must have been an intention to refer to some other deed making an original grant of the greater right, but no such other deed was then, or ever had been, in existence, nor was the lost deed executed until four years thereafter. The reference to the deed of April 11, 1863, must have been correctly made. It described the lesser right as appurtenant to the one-acre tract. The necessary result of this situation is that the deed of May 18, 1870, was only erroneous in reciting the larger right by dimensions, and that such recital when shown to be erroneous does not estop the defendant. It must be rejected as surplusage. *Schmidt v. Olympia Light etc. Co.*, 40 Wash. 131, 136, 82 Pac. 184.

The plaintiffs now claim under a quitclaim deed and redemption from the sheriff's sale. They come into court asking equity, although they claim they failed to take notice of the foreclosure proceedings or of the position occupied by the defendant. They do not seek to recover on the strength of their own title to the one-acre tract, but upon the alleged weakness of the defendant's title to the four-acre tract, as

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shown by a recital in the deed of May 18, 1870, from Clanrick Crosby, Sr., and wife to the pipe company. They are now, and all along have been, represented by the same attorney who foreclosed the mortgage on the four-acre tract. He retained in his own breast the knowledge of the existence of the pen and ink copy of the lost unrecorded deed upon which they now rely. His knowledge was their knowledge. The circumstances of the purchase of title by Schmidt and the redemption from Allen, trustee, in point of time closely followed, or were intimately connected with, the prior acts of Schmidt's attorney who had foreclosed the mortgage for Richardson and Kelly and also had in his possession the copy of the lost deed. Mr. Pomeroy, in volume 2 of the third edition of his work on Equity Jurisprudence, in sections 670 and 671, announces the general doctrine that, for the purpose of binding a principal, notice received by his agent must have been obtained by or imparted to the agent, in pursuance of his authority, in his character as agent; but in section 672 he also states an exception to the general rule in the following language:

"The foregoing requisite, general as it is in its application, is subject to an important and well-settled limitation, equally depending upon motives of expediency. Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite becomes inapplicable; the notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to and wholly unconnected with the prior proceeding or business."

Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. 130; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 54 N. W.

786, 36 Am. St. 932; *McClelland v. Saul*, 113 Iowa 208, 84 N. W. 1034, 86 Am. St. 370.

Under all the records, facts, and circumstances of this case as disclosed by the evidence, we hold that the plaintiffs are only entitled to the lesser water right.

The plaintiffs have based their cross-appeal upon a contention that the trial court did not give them as great a right to go upon the four-acre tract and locate a flume as that to which they are entitled. The defendant has moved to dismiss this cross-appeal for the reason the question which it involves was not presented to the lower court. This contention should be sustained, although upon the merits we are satisfied that the plaintiffs have obtained from the trial court as much equitable relief in this regard as they are entitled to receive. The honorable trial court erred in holding that the plaintiffs were entitled to the greater water right as appurtenant to the one-acre tract.

The cause is remanded to the superior court, with instructions to modify the judgment heretofore entered by entering a final decree adjudging that the plaintiffs are entitled to the lesser water right only as appurtenant to the one-acre tract. In all other respects the judgment will stand affirmed. The defendant having unsuccessfully contested the right of the plaintiffs to any water power whatever, the plaintiffs will recover costs in the superior court. The defendant will recover costs on this appeal.

HADLEY, C. J., FULLERTON, MOUNT, and ROOT, JJ., concur.

RUDKIN, J. (dissenting).—In the light of our former opinion, the questions involved on the present appeal are few and simple and words cannot obscure them. The defendant claims title to the four-acre tract referred to in these several opinions under a mortgage executed by A. H. Chambers and Robert Frost and their respective wives on the 10th day of February, 1892. This mortgage was confessedly subject to

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a certain water right theretofore granted out of the four-acre tract, by the predecessors in interest of Chambers and Frost to the predecessors in interest of the plaintiffs. The plaintiffs contend that such water right was *a column of water twenty inches deep, four feet and seven inches wide, and flowing at a velocity of 522 feet per minute*, while the defendant contends that the right was limited to a *volume of water that might be drawn from a pond through a gate three feet wide and one foot deep*. A water right answering both of these descriptions was reserved in the deed of the four-acre tract from Duncan B. Finch and wife to Chambers and Frost, executed on the date of the mortgage under which the defendant claims, and in prior deeds of the same tract. On the former appeal we held explicitly that the Chambers and Frost mortgage was subject to *the greater water right* now claimed by the plaintiffs, if as a matter of fact the predecessors in interest of the mortgagors had conveyed such greater water right to the predecessors in interest of the plaintiffs prior to the execution of the mortgage.

On the trial had after the cause was remanded, it was clearly proved that the Washington Water Pipe Company, one of the predecessors in interest of the defendant, conveyed the greater water right now claimed by the plaintiffs to W. F. Crosby, one of the predecessors in interest of the plaintiffs, long prior to the execution of the Chambers and Frost mortgage, and the court so found. It is manifest, therefore, that the mortgage under which the defendant claims did not cover or include the greater water right now claimed by the plaintiffs and awarded to them by the court below. Has the defendant acquired any other or greater rights than those covered by and included in the Chambers and Frost mortgage? The majority concede that it acquired no greater rights by the mortgage foreclosure, and this is manifestly true as neither the plaintiffs, nor those under whom they claim, were made parties to that action. But while the majority concede that the foreclosure judgment is not binding on the plaintiffs

or their predecessors in interest because not parties thereto, yet they assert that a notice of *lis pendens* was filed and attempt to predicate some sort of an estoppel on that judgment. This is a novel argument. The rights of the plaintiffs to the greater water right have never been questioned in any judicial proceeding to which they or their predecessors in interest were parties, until the present action was instituted, and yet they are estopped by a judgment to which they are strangers in every sense of the word. I will dismiss this argument without further comment. Is the defendant a *bona fide purchaser*? We decided on the former appeal that it was not, using the following language:

"A party cannot rely on so much of a public record as is favorable to his contention, and close his eyes to the remainder. Assuming that the respondent examined the records before its purchase, it not only had notice of the mortgage and the Crosby water deed therein referred to, but also notice of all other instruments in the chain of title, including the deed from Finch and wife to Chambers and wife, particularly referred to in the mortgage itself. In other words, it had constructive notice of all the instruments and all the facts heretofore recited. These were ample to put it upon inquiry, and in the face of such records and such notice, the plea of *bona fide purchaser* cannot prevail."

For the purpose of this dissent it is perhaps sufficient to say that that opinion, whether right or wrong, has become the law of this case; but, untrammelled by precedent, I could not reach a different conclusion. The very last deed in the defendant's chain of title, executed on the same date as the Chambers and Frost mortgage, recites that it is: "Subject, nevertheless, to the grants of water power heretofore made by the said parties of the first part within the said described boundaries; that is to say, for the said flouring or grist mill of C. Crosby, heretofore described as 'Crosby's new mill,' a column of water twenty inches deep, four feet seven inches wide, and running with a velocity of five hundred and twenty-two feet per minute, which water power was granted by deed

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of C. Crosby and wife to C. Crosby & Co. recorded in the office of the county auditor of Thurston county in deed records, vol. 5, p. 9." It is true that no deed was of record at the page indicated, and that a deed recorded at a different page of the same volume conveyed the lesser water right, described in an entirely different manner from that already given. What was the duty of the defendant under such circumstances? An error in the description of the water right reserved and theretofore conveyed was apparent. Had it a right to assume, without inquiry, that the *particular* description given of the water right reserved from the grant was erroneous and that a deed recorded at a different place from that indicated contained the correct description, or was it put upon inquiry? These questions would seem to admit of but one answer.

"It is a familiar principle that every person taking a deed is charged with notice of all recitals contained in the instruments making his chain of title. 'The principle of equity is well-established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination of the deeds, or other muniments of title of his vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained.' " Devlin, Deeds (2d ed.), § 1000.

"The true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser." *Williamson v. Brown*, 15 N. Y. 354, cited with approval in *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.

Nor is the scope of the inquiry limited by the record as might be inferred from the majority opinion. Devlin, Deeds,

§ 1000, *et seq.*; *Sengfelder v. Hill*, *supra*. The defendant not only had notice of the claim that the greater water right had been conveyed and reserved from the recitals in its deeds, but in addition, the foreclosure proceedings through which it claims title showed *the exact nature and extent of that reservation*. Equity rewards the vigilant, but the majority places a premium on negligence and ignorance. *Say nothing and see nothing* is the rule by which future purchasers are to be guided. Much is said in the majority opinion as to the manner in which the plaintiffs acquired the greater water right, the amount they paid for it, and the conduct of certain parties connected with the mortgage foreclosure, but these questions are wholly foreign to the issues in this case, and I will not discuss them. The plaintiffs established their legal right to the relief awarded to them in the court below as against any equity or claim of the defendant. I will add, in conclusion, that on the former appeal this court held that the plaintiffs were entitled to recover on a given state of facts, and those facts were established beyond controversy on the trial below. The trial court entered judgment in obedience to, and in strict compliance with, the mandate of this court, and now that judgment is reversed. A certain amount of conflict in judicial decisions is unavoidable, but a direct and irreconcilable conflict between two decisions in the same case is inexcusable and deplorable. The judgment should be affirmed.

DUNBAR, J., concurs with RUDKIN, J.

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Opinion Per DUNBAR, J.

[No. 6076. Decided May 27, 1907.]

ELIZABETH ASHLEY, *Respondent*, v. THE CITY OF ABERDEEN,
Appellant.¹

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is no evidence of contributory negligence on the part of a pedestrian who fell into an unguarded hole made by the removal of planks in a sidewalk, where there was nothing to contradict her testimony that she was unaware of the condition, the night was dark, and there was no light or guard except a little lumber piled up around the hole, the effect of which would be to cause one to stumble and fall into the hole.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,025 for personal injuries received in a fall into an unguarded hole in a sidewalk, resulting in bruises and the breaking of several ribs, will not be set aside as excessive where there was nothing to indicate passion or prejudice.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 22, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a fall on a defective sidewalk. Affirmed.

R. E. Taggart, for appellant.

C. W. Hodgdon, for respondent.

DUNBAR, J.—Action for damages for personal injuries. The complaint in this case in substance alleges that, on or about the 20th day of January, 1906, a certain portion of the sidewalk in the city of Aberdeen was in an unsafe condition by reason of the planks of the sidewalk having been removed, thus leaving an opening or hole; that such condition had existed for a considerable period of time prior to the date of the accident; that such hole or opening was left exposed, unfenced and unlighted; that plaintiff had no knowledge or notice of such condition of the walk, and without fault on her part, by passing along the sidewalk at the place mentioned,

¹Reported in 90 Pac. 210.

was precipitated into the hole or opening, and received various bruises and broken ribs. The answer was a general denial and an affirmative allegation of contributory negligence on the part of the plaintiff. The case was tried by a jury, and a verdict rendered in favor of the plaintiff in the sum of \$1,025. At the close of the plaintiff's testimony the defendant moved for a nonsuit upon the ground that the plaintiff was not using reasonable diligence or care, which motion was overruled by the court.

The assignments of error are: first, error in overruling said motion for nonsuit; second, error of the court in refusing to reduce the amount of the verdict. We think the court properly refused the motion for nonsuit. It is not claimed that the city was not negligent in maintaining the walk in the condition in which it was maintained, but the contention is that the respondent was guilty of negligence in falling into the hole in the sidewalk. The testimony of the plaintiff, and there is nothing to contradict it, shows that she was unaware of the condition of the walk, that the night was dark, that there was no light or notice of any kind where the sidewalk was torn up, excepting a little lumber which was piled up around the hole in the sidewalk, the only practical effect of which would be to cause a person to stumble and be precipitated into the hole. This court, in common with all other courts, has uniformly held that the pedestrian has a right to presume that the sidewalk of a city will be maintained in a reasonably safe condition. Acting on such presumption, there is no evidence whatever in this record that the respondent was guilty of contributory negligence. Neither is the amount of the verdict so large, considering the injuries proven, as to raise any presumption of passion or prejudice on the part of the jury.

There being no error apparent in the record, the judgment is affirmed.

HADLEY, C. J., CROW, RUDKIN, FULLERTON, MOUNT, and ROOT, JJ., concur.

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Opinion Per RUDKIN, J.

[No. 6222. Decided May 28, 1907.]

Alice Heintz, *Respondent*, v. Charles R. Brown *et al.*,
Appellants.¹

APPEAL—RIGHT TO APPEAL—INTEREST OF PARTY. A sheriff who has been enjoined from proceeding to sell property under execution has such an interest in the controversy as to entitle him to appeal from the judgment.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PROPERTY ACQUIRED WITH SEPARATE AND COMMUNITY FUNDS—EXECUTION—INJUNCTION. Where a wife purchases lands, paying part of the price with her separate funds and the balance with money borrowed by her on the land, the same becomes community property in the proportion that the sum borrowed bears to the separate funds invested therein; and an execution sale for a community debt will be enjoined only to the extent of her separate interests.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered October 19, 1905, after a trial on the merits before the court without a jury, enjoining an execution sale of real property. Reversed.

Tolman & Kimball, for appellants.

Zent & Lovell, for respondent.

RUDKIN, J.—In the month of December, 1900, the plaintiff, Alice Heintz, entered into a contract with the Northern Pacific Railway Company for the purchase of fractional section 5, Tp. 20, N., R. 38 E., W. M., containing 208 and a fraction acres. Under the terms of this contract, the purchase price was to be paid in five annual installments of about \$62 each. Three of these installments were paid by the plaintiff out of her separate funds, acquired by bequest from her deceased father. On the 25th day of January, 1904, she borrowed money on this land from the Holland Bank to pay the deferred payments, or balance due, and on that date

¹Reported in 90 Pac. 211.

received from the railway company a warranty deed reciting a consideration of \$361. In the year 1901 the plaintiff entered into a further contract with the Oregon Mortgage Company for the purchase of the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and lot 1 of section 8, in the same township and range. At the time of the execution of this contract, she paid \$300 on the purchase price from her separate funds, acquired as above stated. On the 25th day of January, 1904, she borrowed money from the Holland Bank on this land to make the deferred payments and received a warranty deed from the mortgage company of that date, reciting a consideration of \$650.

In the year 1902 the plaintiff entered into a further contract with one Kohl for the purchase of fractional section 7 in the same township and range. No payments have been made on the last-mentioned contract, except interest paid out of separate funds. On the 24th day of July, 1905, the defendant Gilson, as sheriff of Adams county, levied on all the above-described lands under and by virtue of an execution issued out of the superior court of Lincoln county on a certain judgment therein entered in an action wherein Charles R. Brown was plaintiff, and the plaintiff herein and John T. Heintz, her husband, were defendants, and gave notice that he would sell the same at public auction to satisfy the above-mentioned judgment and execution. John T. Heintz and the plaintiff, Alice Heintz, were husband and wife during all the times herein mentioned. The judgment sought to be enforced against the plaintiff was for a community debt, and the character of the land in controversy, whether community property or the separate property of the wife, is the only question presented on this appeal. The plaintiff had judgment below enjoining the execution sale, and from that judgment the defendants appeal.

The respondent has moved to dismiss the appeal for the reason that the appellant sheriff has no interest in the con-

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trovery, and cannot appeal from the judgment against him. Counsel has suggested no reason why an officer, who has been restrained from the performance of a duty enjoined upon him by law, cannot appeal from the adverse judgment and we perceive none. The motion to dismiss is therefore denied.

From the foregoing statement it will be seen that the property acquired from the railway company and the mortgage company was paid for in part by the separate funds of the wife, and in part by money borrowed on the property in which she had invested her separate funds. Under the rule announced by this court in *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398, and reaffirmed on rehearing in *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125, the funds borrowed by the wife, even though borrowed on her separate property, or on property in which she had invested her separate funds, was community property, and to that extent at least the property in controversy was paid for with community funds and became community property. See, also, *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Heidenheimer Bros. v. McKeen*, 63 Tex. 229.

In the states where community property laws prevail, the rule seems to be established that property purchased in part with community funds and in part with separate funds is community property to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment. 21 Cyc. 1644; *Schuyler v. Broughton*, *supra*; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Northwestern etc. Bank v. Rauch*, 7 Idaho 152, 61 Pac. 516; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Braden v. Gose*, 57 Tex. 37; *Parker v. Coop*, 60 Tex. 111; *Goddard v. Reagan*, 8 Tex. Civ. App. 272, 28 S. W. 352; *Clardy v. Wilson*, 24 Tex. Civ. App. 196, 58 S. W. 52.

A rule which permits married persons to commingle separate and community funds in the acquisition of property

after marriage, and to assert their separate property rights as against creditors of the community is by no means free from objection, but such a rule is established by the authorities, and we feel constrained to adopt it. It follows that the judgment must be reversed, with directions to ascertain the proportion that the separate funds of the respondent, entering into the purchase price of the property bore to the entire consideration paid, and to enjoin the execution sale to that extent. It is so ordered.

HADLEY, C. J., MOUNT, DUNBAR, CROW, and ROOT, JJ.,
concur.

[No. 6346. Decided June 3, 1907.]

W. H. HEINZERLING, *Respondent*, v. JOHN B. AGEN,
Appellant.¹

PRINCIPAL AND AGENT—AUTHORITY—RATIFICATION—NOTICE TO PUT ON INQUIRY—INSTRUCTIONS. Upon an issue as to whether a principal ratified the unauthorized act of his agent in agreeing to give another one-half of what might be collected upon a claim purchased from such third person, it is error to instruct that the jury might find such ratification if the principal had sufficient knowledge of the transaction to put him on inquiry; and such error is prejudicial where there was conflict as to whether the principal had actual knowledge, and it cannot be said that no other verdict would have been rendered (CROW and DUNBAR, JJ., dissenting).

PRINCIPAL AND AGENT—PROOF OF AGENCY—QUESTION FOR JURY. Where the principal's acts and admissions tend to show that one M. was acting as agent in purchasing a claim, and M. testified that, in making a compromise, he yielded to that claim, although he acted on his own behalf, the question of his agency is for the jury.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 24, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

¹Reported in 90 Pac. 262.

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Opinion Per FULLERTON, J.

Blaine, Tucker & Hyland, for appellant.*Gill, Hoyt & Frye*, for respondent.

FULLERTON, J.—The respondent held an unliquidated claim for damages against one Brokaw, arising out of the sale of certain shares of stock which the respondent had been induced to make, at a loss, by reason of the fraudulent representations of Brokaw. The appellant knew of this claim, and sent one J. A. Munroe, who was then in his employ as bookkeeper and general assistant, to purchase the claim, authorizing him to pay for it \$40 or \$50. Munroe went to the respondent and made the purchase, taking the assignment of the claim in his own name, but instead of the consideration authorized, agreed to give the respondent one-half of all that might be collected from Brokaw on account of the claim. Munroe shortly thereafter collected \$1,200 on account of the claim, and notified the appellant of such collection by telegram, Munroe being then in Seattle and the appellant in California. Afterwards Munroe brought an action against the appellant seeking to recover \$3,100, claimed to be owing him by the appellant, partly for unpaid salary and partly on account of a collection the appellant had made from Brokaw by his aid, and for which the appellant had promised to remunerate him as for extra services over and above his salary. In answer to this action by Munroe, the appellant set up the transaction had between the respondent and Munroe, claiming the \$1,200 collected of Brokaw as his money, and sought to have the same offset against any money he might be owing Munroe. This action the parties thereto subsequently settled by the appellant paying Munroe \$1,000. The respondent, on learning that Munroe was acting as the appellant's agent when the Brokaw claim was assigned to him, and that the appellant was claiming the benefit thereof, brought the present action against him to recover the one-half of the money collected from Brokaw due him by the terms of the contract of assignment. The appellant for answer filed a general denial, and on the

issues thus made, a trial was had, resulting in a verdict and judgment for the respondent, from which this appeal is taken.

On the trial it was conceded that Munroe had departed from his instructions in making the purchase of the Brokaw claim from the respondent, and that if the appellant was to be held bound by the contract he must be held on the theory that he had ratified the same. On the question of ratification, and the question whether or not the appellant had knowledge of all the facts surrounding the transaction when he committed the acts thought to amount to a ratification, the evidence was conflicting, and it became necessary to submit the question to the determination of the jury. In doing so the court charged the jury in part as follows:

"If you should believe from the evidence that the original authority of Munroe was simply to buy this claim of the plaintiff against Brokaw for forty or fifty dollars, yet, if you should further believe from the evidence that thereafter it came to the knowledge of the defendant that Munroe had purchased this claim for him from the plaintiff, with the agreement that the plaintiff was to receive a certain proportion of the collections—I say, if thereafter it came to the knowledge of the defendant that this was the sort of a contract that Munroe made, and he adopted the same as his own contract, recognized it as his own contract, it would be a ratification of the contract, although it differed in terms from the contract which he originally authorized, and that is a question upon which you are to pass in this case. It must be shown that he either had actual knowledge of the variance in the terms of the contract which he originally authorized, or knowledge of such facts and circumstances as would put a reasonably prudent man upon inquiry; and if, with the knowledge of such facts he adopted the contract made under such circumstances, and recognized it as his own contract, he would thereby ratify the contract and become liable for the performance of it; and if you believe, under these circumstances, that such a contract was made between Munroe and the plaintiff regarding this claim of the plaintiff against Brokaw, and if you believe that, under the evidence and the instructions which you receive from the court, the defendant ratified this contract with knowledge of the terms of it, then the plaintiff

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would be entitled to recover in accordance with the terms of the contract made between him and Munroe."

The appellant contends that in order to charge a principal with the unauthorized contract of his agent by ratification, it is necessary to show that the ratification was made with actual knowledge of all the material facts surrounding the transaction, and that the trial court erred in that part of the foregoing instruction wherein it charged the jury that it was sufficient to bind the principal if it appeared that at the time the ratification was made he had "knowledge of such facts and circumstances as would put a reasonably prudent person upon inquiry."

The authorities support the appellant's contention. The general rule undoubtedly is that a principal, before he can be charged with the unauthorized act of an agent by ratification must be shown to have ratified the contract with full knowledge of all the facts attending the transaction; the only exception being where he accepts the benefits of the contract, or intentionally assumes the obligation without inquiry. As said in *Brown v. Bamberger, Bloom & Co.*, 110 Ala. 342, 20 South 114:

"The doctrine of constructive knowledge, or imputation of knowledge from mere notice, does not obtain in this connection. It is what the party sought to be charged knows and not what he has mere legal notice of, that is to be considered in determining whether there has been a ratification. He is charged on full knowledge, and not because he ought to have known, but did not, not because he had notice which should have incited him to an inquiry, which if properly prosecuted would have brought knowledge. As said by Judge Story: 'The principal, before a ratification [of the unauthorized act of an agent] becomes effectual against him, must be shown to have had previous knowledge of all the facts and circumstances in the case, and if he assented to or confirmed the act of his agent, while in ignorance of all the circumstances, he can afterwards when informed thereof, disaffirm it. And the principal's want of such knowledge, even if it arises from his own carelessness in inquiring or neglect in ascertaining facts,

or from other causes, will render such ratification invalid. His knowledge is an essential element.' Story, Agency, § 231, n. 1."

See, also, Mechem, Agency, §§ 129, 148; Clark & Skyles, The Law of Agency, § 106; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Shoninger v. Peabody*, 59 Conn. 588, 22 Atl. 137.

Tested by the foregoing rule, that part of the charge of the court complained of was erroneous, and requires a reversal of the judgment, unless, as the respondent insists, it is not prejudicial, but we think the record, so far from showing that the error was not prejudicial, shows affirmatively that it might have been so. There was a sharp conflict in the evidence over the question whether the appellant had knowledge, at the time he committed the acts thought to amount to a ratification, of the fact that his agent had agreed to give the respondent, in consideration of the assignment, one-half of any sum that might be collected on the assigned claim, and the jury might have found that he had no actual knowledge of the fact, but did have such knowledge thereof as would put a reasonably prudent person on inquiry. Nor can we say that the evidence admitted of no other verdict than that returned by the jury. On all of the material issues there was a substantial dispute, and the case on the facts was one preeminently for the jury.

It is next urged that the court erred in refusing to grant a nonsuit at the close of the respondent's case. This is based on the contention that the evidence failed to show that Munroe was the appellant's agent when he took the assignment. Munroe did testify that he took the assignment originally on his own behalf, but that when the appellant claimed that he took it as his agent he yielded to that claim, and settled with him on that basis. The appellant's acts and admissions, also, support the contention that Munroe was acting as his agent and not independently when he took the assignment. This was sufficient to make a case for the jury, and the court very properly submitted it to them.

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Statement of Case.

The remaining assignments do not require special consideration. It is sufficient to say, therefore, that we have examined them and find them without merit.

For the error noted, the case is reversed and a new trial awarded.

HADLEY, C. J., RUDKIN, ROOT, and MOUNT, JJ., concur.

CROW, J. (dissenting).—Being of the opinion that the instruction complained of stated the law, I dissent.

DUNBAR, J., concurs with CROW, J.

[No. 6723. Decided June 4, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Anna Tufton, Plaintiff*, v. THE SUPERIOR COURT FOR KITSAP COUNTY, *Respondent*.¹

DIVORCE—JUDGMENT—ENTRY NUNC PRO TUNC—ESTOPPEL. A plaintiff in a divorce case, who, after oral announcement of a decree in her favor, settled her differences with her husband and requested that the decree be not entered, and three years later secured another decree of divorce making a different disposition of the property, is not entitled to have a *nunc pro tunc* order for the entry of the first decree; since such an order to correct a record is discretionary, and since she abandoned her right thereto, and third persons have acquired interests under the subsequent decree which would be injuriously affected.

SAME—ENTRY OF DECREE—WHAT CONSTITUTES. An oral announcement for a decree of divorce and disposition of property, followed by the clerk's minutes thereof, which did not state the grounds for the divorce or the disposition of the property, cannot be regarded as a decree, where written findings and a decree were prepared but not signed by the judge or entered because the parties had made up their differences and resumed their marriage relations.

Application filed in the supreme court April 10, 1907, for a writ of mandate to the superior court for Kitsap county,

¹Reported in 90 Pac. 258.

Frater, J., to compel the signing of the findings of fact and decree entered February 4, 1903, in an action for divorce. Writ denied.

J. W. Bryan, for relator.

B. B. Crawford, for respondent.

FULLERTON, J.—This is an application for a writ of mandate. The facts upon which the application is based are in substance these: In the early part of the year 1903, the relator, who was then the wife of one L. C. Merz, began an action against her husband for a divorce. The action proceeded regularly to trial, which was had on February 4, 1903. At the conclusion of the evidence and the argument of counsel, the trial judge announced that a divorce would be granted, announcing at the time the grounds upon which the decree would be rested, and the disposition that would be made of the property of the parties. A minute of the announcement was made by the clerk and entered in the minute book; the minute, however, recorded merely that a divorce had been granted; it did not specify either the grounds on which it was granted or the disposition of the property. Counsel for appellant thereupon proceeded to draft formal written findings of fact for the judge's signature and a formal decree for entry in the journal of the court. These were prepared, served upon opposing counsel, and filed with the clerk some two days later. In the meantime, the relator and her husband had compromised their difficulties and resumed their relation of husband and wife. The relator called in a mutual friend of herself and her husband, told him she had "made up" with her husband and did not wish the decree of divorce signed, and requested him to inform the trial judge of that fact. She also notified her own counsel to the same effect. The friend consulted informed the court of the change in the status of the parties, with the result that neither the findings nor the decree were signed or spread upon the journals of the court.

Two years later the relator began another action for divorce against her husband. This action she prosecuted to a finality, the decree of divorce being entered on May 5, 1906, by a visiting judge who was called in specially to try the cause. This decree was rested upon causes of the same nature recited in the earlier findings, but a different disposition was made of the property. On November 16, 1906, the same judge was asked to sign the findings and decree prepared for signature in the first action above mentioned. This the judge refused to do, and the present proceedings were instituted to procure a writ of mandate requiring them to be signed.

The relator bases her claim to the writ on the contention that a decree of divorce was awarded her by the court on the first trial, valid and conclusive in every particular save only that formal entry thereof was not made on the record, and that now she has the right to have the decree perfected by an entry *nunc pro tunc* of the formal decree. Doubtless a court of general jurisdiction is empowered to make its records disclose what actually transpired, and when a judgment is actually pronounced, or an order actually made which for any reason is not recorded, it may, upon notice to all parties interested, cause such order or judgment to be spread upon its records as of the date when it was actually pronounced or made. But the right to have such judgment or order entered is not absolute in the party obtaining the judgment. The court can exercise a reasonable discretion in the matter; and in the exercise of this discretion, will order the judgment entered only in the furtherance of the interest of justice. If it appears that the party seeking the entry has himself been guilty of conduct that would make the entry improper, or that third persons have acquired interests or rights which will be injuriously affected by the entry, the application will be denied, and the party left to his ordinary remedies.

We think the trial judge was justified in denying the application on each of these grounds, even if it be conceded that

the act of court amounted to the rendition of a decree of divorce. The order was justified on the first ground stated for the reason that the relator, by failing to take any steps toward perfecting the decree for a period of nearly three years, knowing all the time, as she did, the condition in which the case was left, and by instituting and prosecuting to a final decree another action for the same cause, abandoned the proceedings, and estopped herself from asserting that the earlier order was a valid and binding decree. It was justified on the second ground for the reason that the last decree, by the disposition it made of the property of the parties, has created rights in third persons which would be injuriously affected by the perfection of the first decree.

But there is a stronger reason than either of these for denying the application. In this state the superior court in granting a divorce must grant it for a cause distinctly stated in the complaint, proved and found by the court, and the facts found upon which the decree is rendered must be stated. Bal. Code, § 5730 (P. C. § 4641). Although a decree, rendered upon oral findings announced from the bench by the judge, of which no record should be made, might be a valid decree under this statute, the almost uniform practice is to regard the oral announcement from the bench as merely a guide to the preparation of written findings, which, when prepared and signed, are regarded as the real findings on which the decree is based; the cause being deemed as still depending until the formal findings and decree are so prepared and signed. It is evident that the parties as well as court viewed this proceeding in that light. After the announcement was made which the relator now contends was the pronouncement of the decree, her counsel took the trouble to prepare written findings and serve them upon the opposing counsel, and the relator herself, after agreeing with her husband, sent word to the judge requesting that the decree be not signed. The judge also, instead of insisting, as he would had he deemed the cause lacking in only the formal entries, that the formal

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entries be made, declined to sign the findings and decree prepared, although agreeing that they correctly set forth the findings and decree that he intended should be made and entered. These facts to our minds show conclusively that the cause was never concluded. that no decree of divorce was pronounced, and that whatever other rights the relator may now have by way of a further prosecution of the case in the court below, she has no right to have a decree entered therein *nunc pro tunc*.

The application for the writ of mandate is denied.

HADLEY, C. J., RUDKIN, CROW, ROOT, MOUNT, and DUNBAR, JJ., concur.

[No. 6651. Decided June 4, 1907.]

EDWIN J. BROWN, *Appellant*, v. THE STATE OF WASHINGTON
et al., Respondents.¹

ACTIONS—JOINDER. A complaint attempting to allege causes of action against the state to annul a judgment of conviction in a criminal case, against the state dental board with reference to the issuance of a license to practice dentistry, and against the members of the board and certain dental societies for damages, is demurrable on the ground of misjoinder of causes of action.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered July 25, 1906, dismissing an action upon sustaining demurrers to the complaint. Affirmed.

John R. Parker, for appellant.

The Attorney General, and *E. C. Macdonald* and *A. J. Falknor*, Assistants, *Walter M. Harvey*, *Samuel R. Stern*, and *W. F. Meier*, for respondents.

RUDKIN, J.—The plaintiff commenced this action in the superior court of Thurston county against the State, the

¹Reported in 90 Pac. 266.

state board of dental examiners, the individual members of the board as constituted at the time of the commencement of the action, the surviving members of the board as constituted in the year 1903, and certain individuals representing the State Dental Society and the Seattle Dental Club. Demurrers interposed to the amended complaint by the several defendants were sustained, and the plaintiff electing to stand on his pleading and refusing to plead further, a judgment of dismissal was entered. From that judgment an appeal has been prosecuted to this court.

In view of the conclusion we have reached on one of the grounds stated in each of the demurrers, we will not consider the other questions discussed, and will make only such reference to the record as is deemed necessary to present the question to be decided. The complaint avers that the plaintiff was convicted of the crime of practicing dentistry without a license, in the superior court of King county, and was sentenced to pay a fine of \$200, and that the judgment of conviction has been affirmed by this court; that the plaintiff has discovered since the affirmance of the judgment that the state board of dental examiners conspired with certain members of the State Dental Society and the Seattle Dental Club to prevent the plaintiff from obtaining a license to practice dentistry, and to prosecute the plaintiff for practicing dentistry without a license, and that his conviction was encompassed and brought about through such conspiracy. This is the substance of the cause of action against the state, and the prayer of the complaint is that the judgment of conviction be reviewed, reversed, cancelled and annulled and that the state be enjoined from enforcing the judgment during the pendency of the action. As against the state board of dental examiners, the relief sought is that it be required to grant the plaintiff a license to practice dentistry, or that it be restrained from enforcing the provisions of the act relating to the practice of dentistry. The relief sought against the individual defendants and the surviving members of the state

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dental board as constituted in 1903, is that they be required to account to the plaintiff for the damages sustained by reason of the conspiracy complained of.

It will thus be seen that the plaintiff attempts to state the following causes of action: First, an action against the state to review and annul a judgment of conviction in a criminal cause; second, an action to compel the state dental board to issue a license, or to restrain the board from enforcing a certain statute; and third, an action for damages against the surviving members of the state dental board, as constituted in 1903, and certain individuals representing the State Dental Society and the Seattle Dental Club. With the first cause of action, the defendants other than the state have no concern. With the second cause of action, the state and the individual defendants have no concern, and with the third cause of action the state and the state dental board have no concern. Bal. Code, § 4942 (P. C. § 412), provides that several causes of action may in certain cases be united, "But the causes of action so united must *affect all the parties to the action*, and not require different places of trial, and must be separately stated." That these several causes of action do not affect all the defendants is apparent, and unless we are prepared to hold that a suitor may redress all his wrongs in a single action, regardless of the parties affected and regardless of the forms of law, this complaint is manifestly faulty. The demurrers were properly sustained on the ground that several causes of action are improperly united, and the judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT and DUNBAR, JJ., concur.

[No. 6742. Decided June 4, 1907.]

CHARLES VIETZEN *et al.*, *Appellants*, v. J. T. OTIS *et al.*,
Respondents.¹

ABATEMENT AND REVIVAL—TRANSFER OF INTERESTS—PARTIES—SUBSTITUTION—QUIETING TITLE. In an action to quiet title where the plaintiff conveyed the premises pending the suit, an order substituting the purchasers as parties plaintiff, unexcepted to and unappealed from, would probably authorize the prosecution of the suit by the substituted plaintiffs; and certainly, where the conveyance pending the action was satisfactorily proved.

QUIETING TITLE—POSSESSION—ACTION—FORM. The failure of the plaintiff in an action to quiet title to prove that he was in possession or that the land was vacant and unoccupied, is not ground for dismissing the action.

ADVERSE POSSESSION—PAYMENT OF TAXES—QUIETING TITLE—DEFENSE. In an action to quiet title, the payment by defendant of seven years taxes on the property is not a defense, when the last payment was made a few days prior to the commencement of the action.

QUIETING TITLE—DEFENSES—LACHES. An action to quiet title is not barred by the laches of the plaintiff, if commenced within the period fixed by the statute of limitations, and there is nothing to warrant the court in fixing a shorter period.

MORTGAGES—FORECLOSURE—EXECUTION—PLACE OF SALE—PROPERTY IN DIFFERENT COUNTIES. Real property can be sold under execution in a foreclosure case only in the county in which it is situated and by the sheriff of that county, under Const. art. 4, § 6, providing that process of the superior courts shall extend to all parts of the state, Bal. Code, § 5890, providing that decrees of foreclosure shall be enforced by execution, and Bal. Code, § 5195, and Hill's Code, §§ 500 and 507, providing that the writ shall issue to the sheriff of the county in which the property is situated, and for notice and sale in such county; and an execution sale in one county, of lands situated in two counties foreclosed in one action, is void.

SAME—EFFECT OF DECREE AND CONFIRMATION. A mortgage foreclosure sale of land situated in a county other than the one in which the sale was had is not cured by a direction in the decree that the sale be so made, or by confirmation of the sale.

¹Reported in 90 Pac. 264.

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TAXES—PAYMENT—EQUITABLE LIEN. The payment of taxes by persons in possession of land under a void execution sale entitles them to an equitable lien for the amount of the taxes paid and interest.

Appeal from a judgment of the superior court for Thurston county, Chapman, J., entered January 28, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Reversed.

Vance & Mitchell and *J. W. Robinson*, for appellants.

Troy & Falknor, for respondents.

RUDKIN, J.—On the 30th day of November, 1892, J. W. Robinson executed his promissory note in favor of Nelson Bennett, for the sum of \$5,000, and mortgaged the Thurston county property in controversy in this action to secure its payment. On the 6th day of February, 1894, a further mortgage on certain real property lying in Chehalis county was given as additional security for the same indebtedness. On February 20th, 1896, G. H. Emerson, assignee of the note and the two mortgages, commenced an action of foreclosure in the superior court of Chehalis county, and on the 16th day of May, 1896, a judgment of foreclosure was entered by default, decreeing among other things, that the mortgaged premises be sold as required by law, *by the sheriff of Chehalis county, at the front door of the court house at Montesano, the county seat of Chehalis county.* On the 27th day of May, 1896, a special execution issued on the judgment, directed to the sheriff of Chehalis county and commanding him to levy upon, seize, take into execution and sell according to law, both the Thurston and Chehalis county properties, which were specifically described in the execution, or so much thereof as might be necessary to satisfy the judgment. On the 3d day of July, 1896, the sheriff sold the property in both counties at the front door of the court house in

Montesano, as directed, and made return of sale to the court. On the 3d day of October, 1896, an order of confirmation was entered, and in due time a sheriff's deed was executed to the plaintiff in the execution, who became the purchaser at the sale. Thereafter the purchaser at the sheriff's sale conveyed to the defendants herein. This action was commenced in the name of Robinson to quiet title to the Thurston county property, and the present plaintiffs were substituted by order of court as successors in interest to the original plaintiff. The court below found, as a matter of law, that the execution sale under which the defendants claim was valid, and entered a judgment of dismissal. From that judgment both parties have appealed.

The defendants, however, do not question the form or correctness of the judgment of dismissal, but assign other and additional reasons why such a judgment was proper. These grounds we will now consider. It is first contended that the proof fails to show that the present plaintiffs are the successors in interest to the original plaintiff. The order of substitution was made after notice, and the court therein found that the original plaintiff conveyed the property in controversy to the substituted plaintiffs since the commencement of the action. This finding was not excepted to, nor is the order of substitution assigned as error. The order of substitution of itself, under such circumstances, would in all probability authorize the prosecution of the action in the name of the present plaintiffs, without further proof; but, in any event, we think that the conveyance during the pendency of the action was clearly and satisfactorily proved.

It is next contended that the court erred in finding that the original plaintiff was in possession of the property at the time of the commencement of the action, in not finding that the defendants were in possession, and in not dismissing the action for that reason. This contention is based on *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531. That case was overruled

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in *Brown v. Baldwin*, ante p. 106, 89 Pac. 483, and under the latter decision, the failure of a plaintiff to prove possession, or that the premises are vacant and unoccupied, is no longer a ground for dismissal in this form of action.

It is next contended that the defendants have paid more than seven years taxes. While more than seven years taxes have been paid or compromised, yet the first payment was made within a few days prior to the commencement of this action. Such a payment cannot avail the defendants as a defense. *Tremmel v. Mess*, ante p. 137, 89 Pac. 487.

It is lastly contended that the original plaintiff has been guilty of laches in the prosecution of his action, but there is nothing in the record that would warrant a court in holding the action barred short of the period of limitation fixed by law.

This brings us to the principle question in the case, namely, the validity of the sale of Thurston county real property in Chehalis county by the sheriff of Chehalis county, and, if invalid, was the irregularity cured by the direction in the decree of foreclosure that the sale should be so made, or by the subsequent order of confirmation. Our constitution and statutes would seem to leave little room for doubt on the first question. Section 6 of article 4 of the constitution provides that the process of the superior courts shall extend to all parts of the state. Bal. Code, § 5890 (P. C. § 1278), provides that decrees of foreclosure may be enforced by execution as an ordinary decree for the payment of money; that the execution shall contain a description of the mortgaged property; that the sheriff shall proceed to sell the mortgaged property or so much thereof as may be necessary to satisfy the judgment, after giving the notice prescribed by the section relating to the sale of property under execution; that if there is a deficiency the officer shall forthwith proceed to levy upon any property of the judgment debtor not by law exempt, and that subsequent proceedings shall conform to the provisions of

law relating to sales on execution, except as to the matter of notice.

Turning now to the law governing executions, Bal. Code, § 5195 (P. C. § 810), provides that the writ shall be directed to the sheriff of the county in which the property is situated, or to the coroner where the sheriff is a party or interested. The next section provides that the party in whose favor a judgment is rendered may have execution issued to any county in the state. Section 500, 2 Hill's Code, under which the execution sale in question was made, provided that notice of the sale should be posted and published in the county where the sale was to take place, and section 507, Id., that the officer conducting the sale should make return to the court out of which the execution issued, except where the execution issued out of this court, in which case the return should be made to the superior court in which the action was commenced. Construing all these provisions together, there is no escape from the conclusion that real property can only be sold on execution in the county in which the property is situated, and by the sheriff of that county, and we think that such has been the uniform practice. If we are correct in this conclusion, under the great weight of authority, the execution sale and sheriff's deed under which the defendants claim, are null and void. Rorer, Judicial Sales, § 779; Freeman, Void Judicial Sales, § 31; 17 Cyc. 1239; 21 Century Digest, Title Execution, § 624; *Casseday v. Norris*, 49 Tex. 613; *Moody v. Moeller*, 72 Tex. 635, 10 S. W. 727; *Pollard v. Cocke*, 19 Ala. 188; *Jenners v. Doe*, 9 Ind. 461; *Thacher v. Devol*, 50 Ind. 30; *Paulsen v. Hall*, 39 Kan. 365, 18 Pac. 225; *Collins v. Perkins*, 31 Vt. 624.

In *Pollard v. Cocke*, *supra*, the court said:

"The question is, can the marshal of the Southern District make a valid sale in that district of land situated in the Middle District. We feel satisfied that he cannot. He is acting in the matter of such sale wholly without his jurisdiction, and consequently without authority. The want of authority to

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sell goes to destroy the deed, as much as though he had no execution, and this may be inquired of collaterally, for it is clearly distinguishable from those cases where the officer has power to make the sale, but proceeds irregularly in the execution of that power. In the latter case his deed must be set aside, if at all, by a direct proceeding; in the former, it is absolutely void."

The defendants, however, contend that there is a distinction between foreclosure sales in equity and execution sales at law, and cite *Cargile v. Ragan*, 65 Ala. 287, where it was held, that a sale made by a register in Chancery at an improper time or place is merely irregular, and is cured by confirmation. Whatever the rule may be in jurisdictions where the chancellor has a discretion as to the time or place of sale, such rule can have no application here, where we have but one form of action for the enforcement of private rights and the redress of private wrongs, and where all judgments and decrees are enforced by the same officer, under the same statutory provisions, enacted doubtless for the protection of property owners. We are therefore of the opinion that the execution sale and the sheriff's deed are null and void, and that no title passed thereunder.

Was the defect in the sale cured by the direction contained in the decree of foreclosure that it should be so made, or by the subsequent order of confirmation? We think not. The place where the mortgaged property should be sold, or the personnel of the officer by whom the sale should be conducted, was not an issue in the foreclosure suit, and was not before the court for decision or direction. We think its direction in that regard was in contravention of the statutes of the state, without the issues in the case, and without the jurisdiction of the court. Black on Judgments (2d ed.), § 242. Under the express provision of our statute and numerous decisions of this court, irregularities in the manner of conducting sales are the only defects cured by confirmation. We hold, therefore, that the sale in question was utterly void in its inception, and re-

mains so notwithstanding the direction in the decree of foreclosure and the order of confirmation. The plaintiffs were entitled to the relief demanded in their complaint, but the defendants, under repeated decisions of this court, have an equitable lien on the land for taxes paid, and the judgment quieting title must be in subordination to that lien. The amount of taxes paid up to the time of the trial appears in the record before us, but inasmuch as other payments may have been made since that time, we will not direct a final judgment.

The judgment of the court below will be reversed, with directions to enter a judgment quieting the title in the plaintiffs, subject to a lien in favor of the defendants for all taxes by them paid, with legal interest from the date of payment. The court will ascertain the amount of such taxes and direct a sale of the property to satisfy the lien, if the amount is not paid within a time to be fixed in the judgment. Reversed and remanded accordingly.

HADLEY, C. J., FULLERTON, CROW, ROOT, MOUNT, and DUNBAR, JJ., concur.

[No. 6696. Decided June 5, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM GOHL,
Appellant.¹

WEAPONS—RIGHT TO BEAR ARMS—STATUTES—VALIDITY—CONSTITUTIONAL LAW. Bal. Code, § 7085, prohibiting the organizing, maintaining or employing of an armed body of men, does not violate Const., art. 1, § 24, guaranteeing the right of an individual citizen to bear arms in defense of himself or the state.

JURORS—BIAS—DISCRETION OF COURT. A juror will not be found to be disqualified by actual bias, as defined by Bal. Code, § 4983, by reason of answers to questions based on assumption of facts not supported in the record, where he had no knowledge of the case and

¹Reported in 90 Pac. 259.

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no opinion as to the guilt or innocence of the accused and, considering his examination as a whole, the trial judge could not be said to have abused the discretion reposed in him by such statute.

CRIMINAL LAW—TRIAL—ORDER OF PROOF—DISCRETION. The order of admitting proof, before establishment of the *corpus delicti*, is within the discretion of the trial court.

WEAPONS—EMPLOYING ARMED FORCE—WHAT CONSTITUTES. One is guilty of violating the statute prohibiting the organizing, maintaining or "employing" of an armed body of men, where he caused them to assemble and took them in a launch for the purpose of intimidating the master of a schooner and thereby removing a part of the crew; it being sufficient if he "employed" the men in the sense of making use of them for a specific purpose, although he did not "hire" them.

SAME—QUESTION. Upon a conflict in the testimony as to whether defendant employed men, whether they were armed, and as to their mission, the questions are for the jury.

CRIMINAL LAW—APPEAL—REVIEW. A general exception to an instruction in a criminal case containing several propositions is insufficient if the instruction is in part correct.

SAME—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. An instruction defining what would be employing an armed body of men, and authorizing the jury to find the defendant guilty if they believed that he committed specified acts constituting the offense within the definition, is not objectionable as a comment on the facts.

SAME. An instruction stating the evidence which had been introduced by the parties in support of their claims is a comment on the facts, and reversible error, if prejudicial.

SAME—APPEAL—HARMLESS ERROR. Where in a criminal trial, the judge commented on the facts by stating that certain evidence had been produced to sustain certain claims, it sufficiently appears to be error without prejudice when such facts had been testified to by the appellant and other witnesses and were uncontradicted.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 12, 1906, upon a trial and conviction of the crime of organizing, maintaining and employing an armed body of men. Affirmed.

Marquis & Shields, for appellant.

E. E. Boner and *W. I. Agnew*, for respondent.

RUDKIN, J.—The appellant was convicted of the crime of organizing, maintaining and employing an armed body of men, in violation of Bal. Code, § 7085 (P. C. § 1967), and from the judgment and sentence of the court, the present appeal is prosecuted.

The trial court overruled a demurrer to the information, and upon this ruling the first assignment of error is predicated. The only question raised by the demurrer is the validity of the act under which the information was filed, the appellant contending that it is violative of section 24 of article one of the constitution, which declares that "The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired." A constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state. The freedom of speech and of the press guaranteed by the constitution of the United States and the constitutions of the several states has never been construed to carry with it an unbridled license to libel and defame. Nearly all the states have enacted laws prohibiting the carrying of concealed weapons, and the validity of such laws has often been assailed because denying to the citizen the right to bear arms, but we are not aware that such a contention has ever prevailed, except in the courts of the state of Kentucky. Besides, the constitutional provision quoted does not stand alone. It is followed by the express provision that it shall not be "construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men,"—the exact language of the act under which the information was filed. Counsel argue that the act is too sweeping in its terms, that it forbids the organization, maintenance or employment of an armed body of men *for any purpose whatever*, that it exempts no military organization, that high school cadets cannot organize for the purpose of drill, that the sheriff cannot organize a posse, etc. It will be time enough to consider these questions when they

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arise, but we might suggest at this time that the statute has no application to bodies of men armed by the state or by its authority. We are satisfied that the statute is free from constitutional objection, and the demurrer was properly overruled.

The denial of a challenge for cause interposed to the juror Coats is the next error assigned. We will say, in passing, that this juror was afterwards excused by the appellant on peremptory challenge, and did not sit in the case, but inasmuch as the appellant exhausted all his peremptory challenges, we will assume that the question of the juror's qualification is properly before us. Our attention is directed to the answers given to some eight or ten questions propounded to this juror by the appellant, and from these answers it is argued that the juror was not qualified. The questions thus propounded were based largely on assumption and facts which find no support in the record before us, and the entire testimony of the juror must be considered in this connection. He had no knowledge of the facts in the case, no opinion as to the guilt or innocence of the accused, and it must be conceded that he was in all respects a qualified juror, unless disqualified by actual bias. Actual bias is defined by our statute as, "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." Bal. Code, § 4983 (P. C. § 597). Considering the examination of the juror as a whole, we cannot say that the trial judge who heard his testimony and observed his demeanor abused the discretion vested in him by law.

The third and fourth assignments are, that the court erred in admitting any testimony under the information, and in admitting the testimony of the witness Hansen as to happenings on the trip down the bay before the *corpus delicti* was

proved. The former objection has already been considered under the first assignment of error, and as to the latter it is only necessary to say that the order of proof rests in the sound discretion of the trial court.

The next assignment is that the court erred in refusing to direct a verdict of acquittal at the close of the state's case. In support of this motion the appellant contends that the proof failed to show that he either organized, maintained or employed the armed body of men in question. For the purposes of this appeal, it may be conceded that he neither organized nor maintained the men; and if the word "employ" in the statute is used in the sense of "to hire"—in other words, if it was incumbent on the state to show that the relation of master and servant existed between the appellant and the armed men—the state has failed in its proof. But is the meaning of the word "employ" thus restricted? The act under which the information was filed recites that the state has provided for and maintains an efficient military and police force, ample for the protection of her citizens in their persons and property, and then proceeds to declare that it shall be unlawful for any person, corporation, or association of persons, or agents of any person, or member, agent or officer of any corporation or association of persons, to organize, maintain or employ an armed body of men in this state for any purpose whatever. Armed bodies of men are a menace to the public, their mere presence is fraught with danger, and the state has wisely reserved to itself the right to organize, maintain and employ them. If we assume that the appellant caused this armed body of men to assemble, and took them down the bay in a launch for the purpose of intimidating the master of the sailing schooner Fearless, and thereby removing a part of the crew from such schooner, as charged in the information and contended for by the state, his act falls clearly within the mischief against which the statute is directed, and in our opinion falls within the prohibition of the statute it-

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self. Webster thus defines the word "employ": "To use; to have in service; to cause to be engaged in doing something; to make use of as an instrument, a means, a material, etc., for a specific purpose." We think this is the sense in which the term *employ* is used in this statute, and if the appellant made use of an armed body of men as an instrument or agency to accomplish some specific purpose, he *employed* them within the meaning of the act. *Mousseau v. Sioux City*, 113 Iowa, 246, 84 N. W. 1027. The testimony is extremely conflicting on the question whether the appellant employed the men, whether the men were armed, and what their mission was. Under this state of the testimony all these questions were for the jury.

The second instruction of the court was as follows:

"If you believe beyond a reasonable doubt that the defendant on the second day of June last and within this county and state, caused to be assembled together a body of men for the purpose of going to the schooner Fearless then situated within this county, and procured a gasoline launch for the purpose of conveying that body of men to the schooner, and that he assembled them under an understanding that they were to be armed with fire arms, and proceed to the schooner for the purpose of intimidating the captain or master of the schooner, and thereby remove the cook or any other member of the crew of the said schooner, then that would constitute an organizing, maintaining and employing an armed body of men contrary to the statute and the defendant would be guilty, and you should so find. The word employ as used in the statute does not mean to hire, but it means to use, whether under hire or not. In relation to the arming of the men you are instructed that it would be immaterial whether or not all the men in the party were armed. It would be sufficient so far as the arming is concerned if any considerable number of them were armed, and their purpose was unlawful, and the others were aiding and abetting those that were armed."

The only exception to this instruction is in the following words: "Excepted to by defendant. Exception allowed."

The instruction contains several distinct propositions. It recites the facts which, in the opinion of the court, would warrant a verdict of guilty. It defines the term "employ," and the term "armed." We are of opinion that the instruction correctly defined the term "employ" and the term "armed," and therefore the exception is not sufficient to enable this court to review the charge as a whole. In any event, we do not think that the charge is a comment on the facts, and this is the burden of the appellant's argument against it.

The fourth instruction, which was excepted to, merely sets forth the contentions of the respective parties as to certain facts, but does not comment on the facts, as claimed. The instruction perhaps states some abstract propositions which have no direct or material bearing on the case, but we fail to see how the appellant could be prejudiced thereby.

The fifth and sixth instructions are as follows:

"Evidence has been offered by the state for the purpose of proving to you that these men when they went down on the launch to the schooner were armed with fire arms.

"It is admitted by the defendant that some of the men in the party had fire arms in their possession. It is contended, however, by the defendant that he did not know there were fire arms in possession of any of the men in the party until after they had started down the river on the launch, and that, when he discovered a gun in the possession of one of the men he took it away from him, and put it out of his reach. He also contends that, when he discovered another gun in the possession of another of the men of the party, he requested the captain of the launch to take that second gun away from the man in whose possession it was, and that the captain of the launch did so, and put that gun also beyond the reach of any of the party. Now the evidence in relation to these two contentions on the part of the state and the defendant is all before you, and it is for you to determine from the testimony of the witnesses and all of the circumstances surrounding the case which of these contentions is true. There has been evidence offered to you for the purpose of showing that there was shooting of the fire arms between the men on board the schooner and those on board the launch, each contending that

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the other shot first. It is admitted by both parties that shooting between them did occur, but each contends that the other shot first and that they then fired in response. The evidence on this point is all before you and it is for you to determine which is correct, and if after considering all of the evidence in the case, both for the state and for the defendant, not only this to which I have particularly called your attention but also all the other evidence in the case, you then believe beyond a reasonable doubt that the defendant is guilty, you should so find, if you have a reasonable doubt you should acquit."

In these instructions the court manifestly does comment on the facts, but erroneous instructions do not necessitate a reversal, unless they tend in some manner to prejudice a party's cause before the jury. Prejudice will be presumed from an erroneous charge, and the burden is upon the adverse party to show that no prejudice could or did in fact result, but we think a want of prejudice clearly appears from the record in this case. The appellant and all his witnesses testified that some of the men in the party had firearms in their possession, and that shooting between the parties in the sailing vessel and in the launch did in fact occur. These facts were reiterated by many witnesses and controverted by none. Under such circumstances, we fail to see how the appellant could be prejudiced by a mere statement of such uncontroverted facts by the court. Such comment as this should be scrupulously avoided by trial judges, but an appellate court cannot reverse a judgment for error without prejudice.

We have examined the other errors assigned, but find no reversible error, either in the charge of the court, in the refusal to charge as requested, or in the refusal of a new trial. The evidence before the jury was legally sufficient to sustain their verdict, and finding no prejudicial error in the conduct of the trial, the judgment must be affirmed, and it is so ordered.

HADLEY, C. J., ROOT, MOUNT, DUNBAR, and CROW, JJ.,
concur.

[No. 6635. Decided June 5, 1907.]

ALBERT WILSON, *Appellant*, v. THE STATE OF WASHINGTON
*et al., Respondents.*¹

CRIMINAL LAW—WRIT OF CORAM NOBIS—WHEN ISSUES. The writ of *coram nobis* will not issue to set aside a judgment of conviction upon the ground that the testimony of the defendant was given under a misapprehension and was believed by him to be true owing to misrepresentations of his partner and codefendant, who is now dead, and who confessed to the crime after the trial and to misleading the defendant into giving the false testimony.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered October 10, 1906, denying an application for a writ of error *coram nobis* to set aside a judgment of conviction of larceny. Affirmed.

Frank C. Owings and *G. C. Israel*, for appellant, cited: *Pierce's Code*, § 249 (*Bal. Code*, § 4783); *State ex rel. Davis v. Superior Court*, 15 Wash. 339, 46 Pac. 399; *State v. Armstrong*, 41 Wash. 601, 84 Pac. 584; *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 34 Am. St. 141; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Alder v. State*, 35 Ark. 517; *Beaubien v. Hamilton*, 4 Ill. 213; *Maple v. Havenhill*, 37 Ill. App. 311; *Jeffery v. Fitch*, 46 Conn. 601; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Latshaw v. McNees*, 50 Mo. 381; *Roughton v. Brown*, 53 N. C. 393; *Giddings v. Steele*, 28 Tex. 732; *Williams v. Edwards*, 34 N. C. 118; *Merritt v. Parks*, 25 Tenn. 332; *Phillips v. Russell*, Fed. Cas. No. 11,105a; *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Fellows v. Griffin*, 17 Miss. 362; *Abernathy v. Latimore, Jenkins & Co.*, 19 Ohio 286; *Crawford v. Williams*, 31 Tenn. 341.

P. M. Troy, for respondents.

¹Reported in 90 Pac. 257.

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DUNBAR, J. — The appellant, together with one Peter Currie, was convicted in the superior court of Thurston county of the crime of larceny of neat cattle. An appeal was prosecuted in the supreme court of this state, and the judgment of the superior court affirmed. *State v. Wilson*, 42 Wash. 56, 84 Pac. 409.

During the pendency of the appeal, the appellant's co-defendant, Currie, committed suicide. Upon the receipt of the remittitur by the clerk of the superior court, the appellant filed in said superior court his application for a writ of *coram nobis*. The court refusing to grant the writ, an appeal was taken to this court. The ownership of the cattle was alleged to be in one J. F. McCorkle. These cattle were found, some of them in September, 1904, and some of them in January, 1906, with the brand of Wilson and Currie upon them. Wilson and Currie were partners in the conduct of a farm and in the business of purchasing and selling cattle. The defense was ownership of the cattle in question. The appellant Wilson at the trial testified that he had branded certain of the calves which were the subject of the indictment, and that they belonged to him and Currie. He now declares that he was mistaken as to the identity of the cattle; that the cattle he had been charged with the larceny of were in fact cattle belonging to McCorkle, but that he believed that they were the cattle he had branded when he so testified, and that he was led to make the mistake in the identity by reason of the similarity of the cattle of McCorkle and the cattle branded by him; that he was primarily led to make the mistake by reason of Currie's misrepresentations; that the cattle were in fact stolen by Currie, a fact of which Wilson was entirely ignorant, and that he relied upon the statement made by his partner, who is also his brother-in-law, that they were the owners of the cattle and that they were the same cattle which Wilson had helped to brand; and that Currie after the conviction had confessed to Wilson, the appellant, that the cattle

in controversy were McCorkle's cattle, and that he had deceived Wilson as to their ownership. These are in substance the facts on which the petition for the writ is based.

It is contended by the respondent that the writ of *coram nobis* is obsolete in this state. While it is true that our code has made many provisions for appeal which did not exist at the common law, we are not prepared to say that the statutes have abrogated all the rights which the common law bestowed upon defendants in criminal actions. But conceding for the purposes of this case that the writ of *coram nobis* is available in a proper case shown, the petition here fails to present a case for relief, either under the provisions of the statute or of the common law. Writs of *coram nobis* were prosecuted at common law for the purpose of bringing to the attention of the court certain facts which could not have been presented at the former trial, and which, upon being made to appear, would justify the entry of a different judgment, but the writ was never intended to take the place of a motion for a new trial, and if it had been, our statute makes adequate provisions for that. The sufficiency of a petition to warrant the issuance of this writ has twice been before this court. In *State ex rel. Davis v. Superior Court*, 15 Wash. 339, 46 Pac. 399, the affidavit in support of the petition alleged that the testimony of the complaining witness in the trial of the case was not in accordance with the facts but was fraudulent and untrue, and that she had afterwards testified to its untruthfulness. The court in passing upon the sufficiency of the petition said:

"If satisfied that the writ might issue in a proper case, we would nevertheless be constrained to hold the petition in the present case insufficient. It was based upon the claim that the testimony of the complaining witness in the trial of the criminal case 'was not in accordance with the facts but was fraudulent and untrue.' We have been unable to find a case where the writ has been granted upon such showing, and upon principle we think that it ought not to be regarded

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as sufficient. The prosecutrix was a witness before the jury and sworn to testify truly. To receive her subsequent statement for the purpose of discrediting or impeaching the proceedings or judgment would be to open wide the door to fraud and lead to most baneful results. The law, upon considerations of public policy, will not receive the affidavit of a juror to impeach his verdict, and renders inadmissible the testimony of third persons as to what they heard jurors say in derogation of their verdict. Like considerations constrain us to hold that the remedy cannot be invoked upon a mere showing that the prosecuting witness has subsequently made contradictory statements, or that she is now willing to swear that her former testimony upon the trial was false. Her latter oath is no more binding than her former one."

The same might be said of the alleged statement of Currie that he had sworn falsely in regard to the ownership of the cattle, even if such oath was presented to the court, but this is not so strong a case. It is simply the affidavit of a co-defendant that Currie told him, not under oath, that certain things he swore to were untrue. And this statement in regard to Currie's statement to the appellant was not made until after Currie's death. The showing is not sufficient to set aside a judgment of a court which has been found upon appeal to the highest jurisdiction of the state to have been based upon a legal and fair trial, and to permit the appellant, after having sworn to a statement of facts which was found by the jury trying him not to be true, to now come in and obtain a new trial by swearing that he was mistaken and was testifying under a misapprehension of the true facts when he swore to the ownership of the property, and as a basis for this statement furnish only the alleged statement of his codefendant who is now dead, and try the cause again upon another issue, would be to make a farce of the administration of the criminal law.

In the case of *State v. Armstrong*, 41 Wash. 601, 84 Pac. 584, it was held that an application for a writ of *coram nobis* was insufficient where the writ was sought to set aside a con-

viction of murder, because of the commission of perjury of a juror upon his *voir dire*, not discovered until after the decision of the case on appeal; since the qualifications of the juror had been adjudicated, and a writ could not be employed to set aside verdicts on account of perjury. The many cases cited by the appellant to sustain, and which do sustain, his contention that the writ of *coram nobis* is not obsolete in the code states, do not sustain the issuance of the writ on the petition and affidavits filed in this case.

The trial court, not having erred in refusing to issue the writ, the judgment is affirmed.

HADLEY, C. J., MOUNT, ROOT, RUDKIN, FULLERTON, and CROW, JJ., concur.

[No. 6679. Decided June 11, 1907.]

JOHN ALBIN *et al.*, Respondents, v. SEATTLE ELECTRIC COMPANY, Appellant.¹

APPEAL—DECISIONS REVIEWABLE—ORDERS ON PLEADINGS. No appeal lies from an order permitting the filing of an amended complaint.

SAME—REVIEW—QUESTIONS PRESENTED. An appeal from an order refusing to strike an amended complaint and dismiss the action, does not bring up the question whether the action is barred by the statute of limitations, or the sufficiency of the pleading.

SAME—DECISIONS REVIEWABLE—GRANT OF NEW TRIAL. An order granting a new trial is not appealable when it is made pursuant to directions of the supreme court in reversing the case on a former appeal.

Appeal from an order of the superior court for King county, Tallman, J., entered November 5, 1906, refusing to strike a complaint and dismiss the action, and granting to plaintiffs a new trial. Appeal dismissed.

¹Reported in 90 Pac. 435.

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Opinion Per Roor, J.

Hughes, McMicken, Dovell & Ramsey, for appellant.*John B. Hart and Herbert E. Snook*, for respondents.

Roor, J.—This case was here once before and may be found reported in 40 Wash. 51, 82 Pac. 145. At that time a judgment in favor of plaintiff was reversed on account of evidence having been admitted as to facts not pleaded in the complaint. Subsequent to that decision, plaintiff asked permission of the superior court to file an amended complaint charging a number of specific acts of negligence not alleged in the original complaint. Over defendant's objection, permission to file said amended complaint was given by the superior court. Defendant then moved to strike the amended complaint and to dismiss the action. This motion was denied by an order which also directed a new trial. From this order, the present appeal is prosecuted.

Respondents have moved to dismiss the appeal upon the ground that said order was not appealable. It is urged by appellant that the order permitting the amended complaint to be filed amounted to the substitution of a new and different cause of action, and that this was inconsistent with the direction of the supreme court, and furthermore not legally permissible for the reason that the statute of limitations had run—the accident having occurred more than three years prior to the time of filing the amended complaint.

An order of the superior court permitting the filing of an amended complaint is not one from which an appeal lies. Ordinarily an order granting a new trial is appealable. The statute so provides, but this statute does not apply where the order granting a new trial is made pursuant to directions of the appellate court. The question as to whether the statute of limitations had run as to the new matters embraced in the amended complaint cannot be brought before this court upon this appeal. Neither can we at this time inquire as to the propriety of permitting the filing of such amended complaint.

Finding no authority for the maintenance of this appeal, the motion for its dismissal is granted.

HADLEY, C. J., FULLERTON, RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 6709. Decided June 11, 1907.]

TEKLA PACHKO, *Respondent*, v. WILKESON COAL AND COKE COMPANY, *Appellant*.¹

APPEAL—REVIEW—VERDICTS. The verdict of a jury upon evidence sufficient if true to support the findings, cannot be disturbed by the supreme court.

SAME—HARMLESS ERROR. Error in admitting evidence of changes made after an accident to an employee is not prejudicial where it was not capable of injuring the party complaining thereof.

MASTER AND SERVANT—SAFE PLACE—MINES—STATUTORY DUTY. The statute requiring mine owners to furnish sufficient timbers to protect employees from "caving in" of the mine applies to the falling of a "nigger-head" or boulder in a coal mine.

SAME—INJURY TO SERVANT—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the death of a miner was caused by the fall of nigger-heads in a coal mine, where a witness nearby heard the fall, and there were nigger-heads in the face of the coal and walls where deceased was working, and two or three of these were found near decedent's body immediately after his death.

SAME—ASSUMPTION OF RISKS—FAILURE OF STATUTORY DUTY—MINES. The defense of assumption of risk by a coal miner of the danger in working with an insufficient number of timbers cannot be raised where the master has violated a statutory duty to furnish sufficient timbers.

Appeal from a judgment of the superior court for Pierce county, Linn, J., entered November 15, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the wrongful death of an employee in a coal mine. Affirmed.

¹Reported in 90 Pac. 436.

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Opinion Per Root, J.

*F. S. Blattner and Frank H. Kelley, for appellant.**Newton H. Peer and Charles O. Bates, for respondent.*

ROOT, J.—This is an action for damages occasioned by the death of respondent's husband while employed in appellant's coal mine. Decedent was an experienced coal miner, and was at work with a partner named Wilsco, at the time of his death. The vein upon which they were at work was about three and one-half feet thick, with a pitch of about thirty-five degrees. The work was in progress in three or four pillars under the direction of an assistant foreman, who was supervising eight pillarmen, three timber packers, one chute starter, and one driver. The work in which decedent and partner were engaged required timbers to be used as props to keep the hanging and foot walls from closing together as the coal was removed. These timbers are also used to construct cogs and "batteries," so-called, to protect miners from falling coal, rock, and other dangerous substances. They are supplied in seven-foot lengths, to be cut up by the miners as required for any particular place or purpose. They are also used as "steps," extending from prop to prop for the miner to stand on while at work.

The exact manner of decedent's death is not known, as there was no eyewitness. His partner was about twenty feet distant, engaged, according to his evidence, in cutting a prop to support a "nigger-head." A nigger-head is a large, hard substance, frequently found in the coal, or partly in the coal and partly in one or the other of the walls. Ordinarily it is carefully loosed and rolled down, or is supported in place by props. They were frequently found in this mine, and the falling of one of them is alleged to be, and doubtless was, the cause of decedent's death. His partner heard a rattling noise, as from a falling stone or nigger-head, and heard a groan, and upon approaching decedent, found him dead. It was the contention of the plaintiff that decedent was killed by the falling of a nigger-head or heavy stone, which was occasioned

by reason of an insufficient supply of timber to safely protect his working place. The case was tried to a jury, which returned a verdict in favor of plaintiff, upon which judgment was entered. From such judgment this appeal is prosecuted.

It is conceded that the statute requires the furnishing of a sufficient amount of timber by the operator of a coal mine to properly protect the working places of the miners. Appellant contends that this was done in this case. Special interrogatories were submitted to the jury, which, together with the answers returned by the jury, were as follows:

"1. Was the death of Felix Pachko caused by a 'nigger-head' falling or rolling upon him? Answer: Yes. 2. Did the 'nigger-head' fall or roll upon him because it was not supported by timbers? Answer: Yes. 3. How many seven-foot pieces would have been required to safely support the 'nigger-head'? Answer: Not within knowledge of the jury. 4. Were timbers used in getting Pachko's body across the coal chute at the entrance to his working place? Answer: Yes. 5. If timbers were used to get the body across the chute, were they passed down from near the angle of the coal? Answer: Yes, one. 6. If at the time of the accident there were timbers above and near the angle of the coal on which deceased was working, state as nearly as you can how many timbers there were? Answer: One. 7. Were there other unused timbers in addition to those above mentioned which might have been used to secure 'nigger-heads' from falling? If so, how many? Answer: No. 8. At the time of his death did Felix Pachko have sufficient timbers to properly secure his working place? Answer: No."

The evidence given by the witnesses for plaintiff is not satisfactory. Her principal witness admitted that his testimony was contrary to the statements made by him touching material matters, after the accident, and was contrary to a written statement which he signed. But the record reveals sufficient competent and material evidence, if true, to sustain the material allegations of the complaint. The credibility of the witnesses was for the jury, and the trial judge not having

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deemed it proper to grant a new trial, we cannot, upon the record as it is now presented, overturn the findings of the jury upon these material issues.

Numerous objections were made to the rulings of the trial court upon the introduction of evidence, but an examination fails to convince us that any reversible error was committed. One witness was asked if, on the first morning after the accident, he noticed any difference in one of the "counters" from what it had been two or three days before. An objection to this question was overruled. We think this was error, but do not believe that it was capable of prejudicing the rights of the defendant. Ordinarily, evidence should not be admitted as to changes wrought in the situation of the premises after an accident. However, a judgment should not be reversed by reason of an error which was not capable of injuring the party complaining thereof.

Several exceptions are taken to the charge given the jury. We think, however, that the instructions complained of are in accord with the former rulings of this court, and that no error was committed. Exception is also taken to the refusal of the court to give certain instructions requested by the defendant. The substance of most of these was embraced in instructions which the court gave.

It is urged that the falling of the nigger-head was not such a "caving in" as the statute requires a mining company to furnish timbers to guard against. We are unable to agree with this contention. It could make little difference whether it was the coal, or a portion of the wall, or a heavy boulder, or a nigger-head that should fall upon a miner. The result in any such case would be his serious injury or death. It was to protect, so far as practicable, against all such occurrences as might be reasonably anticipated, that the statute was enacted.

It is urged that the evidence does not show where the nigger-head came from that fell upon decedent. It does not so show definitely, but it does show that there were nigger-

heads in the face of the coal above and in the walls, and two or three of these were found near the decedent's body immediately after his death, and we think the jury were justified in inferring that they came either from the coal or the wall, and could have been guarded against by the use of timbers.

It is contended by appellant that the decedent was guilty of contributory negligence. While there is evidence tending to show that he may not have been as careful as he should have been under the circumstances, yet, in the light of all the evidence, it cannot be said, as a matter of law, that he was lacking in care and prudence. Under the evidence as we find it, this was a question for the jury.

Appellant likewise contends that the decedent, having a knowledge of the shortage of timbers and being aware of the dangers of the work, must be held to have assumed the risk. Under the common law this would be true, but this court has heretofore held that, where a person is killed or injured by reason of the employer failing to comply with a statutory requirement, the defense of assumption of risk cannot be invoked. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310.

Finding no reversible error in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and MOUNT, JJ., concur.

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[No. 6734. Decided June 11, 1907.]

MICHAEL BRENNAN *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

TRIAL—NEW TRIAL—MISCONDUCT OF JUROR—APPEAL—HARMLESS ERROR. In an action for injuries sustained through a fall on a sidewalk, which was torn up preparatory to laying a cement walk, a statement of a juror, who visited the premises, as to whether the curb had been raised or lowered, as it looked to him during the trial, which was three years after the accident, is not prejudicial error or ground for new trial, on the ground that it contradicted the testimony of a witness, where the court instructed the jury to disregard such statement, and when the question whether the curb had been raised or lowered was entirely immaterial.

TRIAL—NEW TRIAL—MISCONDUCT OF COUNSEL—APPEAL—HARMLESS ERROR. Misconduct of counsel in argument in referring to a decision of the supreme court upon a former appeal is not reversible error or ground for a new trial, where, upon objection, the court instructed the jury to disregard the same, and both sides had made repeated reference to the decision, and where no abuse of discretion in refusing a new trial on that ground appears.

APPEAL—REVIEW—VERDICTS. A verdict of a jury will not be set aside where the weight of the evidence and the credibility of the witnesses was for the jury, and the trial court denied a new trial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 24, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian through a defective sidewalk. Affirmed.

Scott Calhoun, Elmer E. Todd, and John W. Roberts, for appellant.

R. P. Oldham, for respondents.

Root, J.—This is an action for the recovery of damages occasioned respondent Mrs. Brennan, from a fall alleged to have been caused by catching her foot between a couple of

¹Reported in 90 Pac. 434.

spikes in a stringer from which the boards of a sidewalk had been torn up by the city preparatory to laying a cement walk along one of its streets. The case was before this court once before, and may be found reported in 39 Wash. 640, 81 Pac. 1092, to which reference is made for a more complete statement. Upon the second trial a verdict and judgment thereupon were entered in favor of respondents. From the judgment this appeal is taken.

During the progress of the trial, while a witness for the city—an inspector—was upon the stand, a juror interposed a remark, and the following proceedings occurred:

“Juror: The curb he stated yesterday it was raised. Witness: We raised it about two or three inches. When the curb was put in there with the old wooden walk and come to put in cement it was too low. We had to make the corners level and we raised the curb. Juror: I went past there last night and this morning also, and the way it looks to me it has been cut down two inches. Witness: No, we raised it. It was too low. Mr. Roberts: We note an exception in the record to the statement of the juror made in the presence of the other jurors that he had examined these premises and stating the result of this examination. The Court: What is your name (addressing juror)? Juror: Christman. The Court: I presume you do not realize it, but you are not permitted to go and look at premises unless all the jury goes under the instruction of the court, and anything you saw there yesterday or whenever it was, you will disregard entirely and the rest of you jurors will disregard the statement of Mr. Christman entirely as if it had not been made. Anything that you saw there, when you go into your jury room to make up your decision along with the rest of you jurors, you will disregard as if you had never seen it at all. You are to take the testimony which you received from the witness stand and that alone. Juror: I will state I did not go purposely. I was on my way home. The Court: I understand. You just happened to go up past there. Mr. Roberts: One of the jurors having made a voluntary statement that he had gone and examined these premises and having stated in the presence of all the other jurors the result of the examination, the defendant now objects to proceeding any further with this

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trial with this jury and asks the court now to discharge the jury and order a new trial of this cause. The Court: The request will be denied, and under the instruction which the court, the positive instructions which the court gave the jury before this motion was made, the motion is denied. Mr. Roberts: We will note an exception."

It is urged by the appellant that the conduct of the juror was so highly improper as to constitute an irregularity justifying a new trial; that he had no right to visit the premises, and that his statement to the jury was in effect a contradiction of the city's chief witness and was calculated to discredit the witness in the minds of the other jurymen.

There is no question but that the conduct of this juror in visiting the premises and in making the remark which he did, constituted a serious irregularity. But in the light of all the circumstances of this case, we do not believe that the lower court abused its discretion in refusing to grant a new trial upon this ground. The condition of the premises at the time the jurymen looked at them could not possibly shed any light upon any of the issues involved in the case, the accident having occurred some three years prior thereto, and it being conceded that the situation was entirely changed since then. Consequently the jurymen could not get any material evidence by inspecting the premises at the time he did. It can scarcely be said that the jurymen contradicted the witness. He simply stated how the situation looked to him, which was not necessarily an imputation that the witness for the city had purposely or inadvertently misstated any fact. Moreover, the condition of the curb and the question of whether it had been raised or lowered were absolutely immaterial matters. Neither had any bearing whatever upon any issue in the case. The condition of the curb since the putting in of the cement being entirely immaterial, and there being nothing to indicate that the witness for the city was discredited by what the juror said, we are inclined to think that the instructions which the trial court promptly gave to the jury, to the effect that they

should absolutely disregard any statements the juror had made and should decide the case solely upon the evidence received from the witness stand, were sufficient to relieve the incident of any prejudice to the rights of the appellant.

In the course of his argument to the jury, the attorney for respondents, in referring to the testimony to the effect that respondents had lost their case upon the first trial, made the remark that the "supreme court must have thought she had a good case or it would not have sent it back for another trial." Objection was promptly made by one of appellant's attorneys and sustained by the court, who cautioned the counsel against any argument as to what had occurred in the supreme court, and directing him to confine the argument to the evidence adduced on the witness stand. It is urged that this was misconduct such as should have entitled appellant to a new trial. The statement complained of was reprehensible and does not comport with the usual orderly methods characteristic of the attorney who made it. An appeal of this kind to a jury under certain circumstances might constitute reversible error, but in this case reference had been repeatedly made to the former trial by both sides, and under all of the circumstances, we cannot say that the trial court abused its discretion in declining to grant a new trial upon this ground. Besides what the court said at the time the two incidents occurred, instructions in the general charge at the end of the trial cautioned the jury against considering remarks of counsel or jurymen, and specially directed them to base their verdict solely upon the evidence properly introduced.

It is urged by appellant that the verdict is not sustained by the evidence, but is contrary to the weight thereof. There was much conflict in the evidence upon some of the most material points. However, there was plenty of competent, material evidence which, if believed, could justify the jury in its verdict. It was a case where the credibility of the evidence and the matter of its weight were questions for the jury, and the trial judge having denied the motion for a new trial, the

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condition of the record does not justify us in setting aside the verdict.

Appellant contends that the trial court erred in refusing to strike from the affidavit of jurors the statement that they were not influenced by any talk concerning the appeal to the supreme court, and that they were not influenced by what had taken place with reference to the juror who visited the premises. Under our view of the case these matters become immaterial.

The refusal to grant a new trial is assigned as error, but no reasons are urged aside from those heretofore mentioned. Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 6753. Decided June 11, 1907.]

WILLIAM BOYLE, *Appellant*, v. ANDERSON & MIDDLETON LUMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS. An offbearer in a sawmill cannot recover for injuries sustained in a fall by reason of the constant accumulation of sawdust, bark and refuse upon the floor where he was required to walk, where he was in a position to observe the gradual change and made no complaint to the foreman, who was not shown to have personal knowledge thereof.

SAME—GUARDING DANGEROUS MACHINERY—FACTORY ACT—QUESTION FOR JURY. A nonsuit is error in an action by an offbearer who slipped and fell, throwing his hand into gearing for the live rolls which bear away lumber from a saw, and which were guarded only on top, and unprotected on the lower side about eight inches from the floor, along which gearing the plaintiff was required to walk; since it was a question for the jury whether the gearing could have been, or was, effectively guarded, or whether the accident should have been reasonably anticipated.

¹Reported in 90 Pac. 433.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered February 21, 1907, upon sustaining a motion for nonsuit, dismissing an action for personal injuries sustained by an offbearer in a sawmill. Reversed.

Govnor Teats, for appellant.

W. H. Abel, A. M. Abel, F. S. Blattner, and Frank H. Kelley, for respondent.

ROOT, J.—This is a personal injury case, brought by the plaintiff against the defendant mill company, charging two grounds of negligence.

First: The failure of the mill company to have and maintain a reasonably safe working place for the plaintiff, in that sawdust, bark and other refuse were permitted to accumulate on the floor where plaintiff was required to walk, whereby he slipped and fell; and second, in the failure of the defendant to make plaintiff's place of work reasonably safe by properly guarding the cogwheels and gearings which operate the live rolls along, by, and close to which he was required to work, as provided by the factory act of 1905.

In support of the first ground, appellant introduced evidence tending to sustain most if not all of his allegations. It, however, appeared that appellant was in a position to observe the constant, gradual change produced by means of the sawdust, bark and refuse falling and remaining upon the floor, and that he made no complaint to the foreman or other representative of the respondent although he could readily have so done. It does not appear that the foreman was personally present or knew that said sawdust, bark and refuse were not being properly removed from the place where appellant was working.

Touching the second ground of negligence alleged, it appeared from the evidence that appellant had been working for respondent several years, and at the time of the accident, and for about six months prior thereto, had been working for

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it in the capacity of offbearer along the rolls extending from the head saw back through the mill. These rolls, about twenty in number, were operated by shafting and gearing situated on the cant-deck side of the rolls, on the opposite side from the carriage way. The cogs of this gearing turned in from the lower side. They were about seven to nine inches above the floor. Over the top of each was a cap placed there as a guard or protection to prevent any person from coming in contact therewith. Originally these gearings had been completely covered and boxed in by boiler plate or sheet-iron. Upon rebuilding the framework of the rolls, the top shield or cap was substituted for the boiler plate, it being claimed by respondent that the latter was not practical. It was appellant's duty to walk back and forth near the shaft that operates the gearing mentioned and attend to the boards and slabs as they were conveyed upon the live rolls. While engaged in this work, he slipped, as he claims, upon the sawdust or a piece of bark, and fell to the floor upon his back, and his right hand, being thrown up in a natural manner, came in contact with the cogs and gearings, drawing his arm therein up to his elbow.

It is the contention of the appellant that these cogs and gearings could have been, by reasonable guards, covered so as to have prevented the accident, and that this could have been done with due regard to the ordinary uses of such machinery and the danger to the employees therefrom. Respondent urged that the guard which it had over said gearing was a sufficient compliance with the factory act, and that it is impractical to have a covering that would entirely enclose the gearing, and especially such a one as would prevent one's hand from coming in from the under side; and it further maintains that the accident was an occurrence that an ordinary prudent millowner could not be held to have anticipated. The trial court sustained a motion for a nonsuit and dismissed plaintiff's action. From that judgment this appeal is prosecuted.

As to the first ground of negligence, we think the trial court's conclusion was right; but as to the second, we are constrained to hold, upon the authority of *Noren v. Larson Lumber Co.*, ante p. 241, 89 Pac. 563, that the learned court was in error. Under the factory act and the case just cited, this case should have been submitted to the jury upon the questions as to whether the guard and covering used by respondent constituted a "reasonable safeguard," and whether it was "practicable to guard" the cogs and gearings so as to have prevented the injury to appellant, and whether they were "effectively guarded with due regard to the ordinary use of such machinery and appliances" and as to whether this accident was such an occurrence as an experienced millowner or operator of ordinary prudence, care, and skill might reasonably have anticipated.

The judgment of the honorable superior court is reversed and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 6736. Decided June 15, 1907.]

JOHNSON SERVICE COMPANY, *Appellant*, v. AETNA INDEMNITY COMPANY, *Respondent*.¹

LIMITATION OF ACTIONS—STATUTORY BOND. An action upon a statutory bond given to a school district to guarantee a building contract is barred where the same was not commenced within three years from the time that the debt was contracted and the statute had run against such debt.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 23, 1906, upon sustaining a demurrer to the complaint, dismissing an action on a statutory bond. Affirmed.

¹Reported in 90 Pac. 590.

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Opinion Per Curiam.

George A. Hawley, for appellant.

Shank & Smith, for respondent.

PER CURIAM.—This is the third appeal in this case, it having been fully reported in *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460, and *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849. It is not necessary to restate the case in full. It is sufficient for the purposes of this decision to say that this action was brought upon a statutory bond given by the respondent to the Seattle School District, as provided by Pierce's Code, § 6121 (Bal. Code, § 5925). The respondent interposed a demurrer to the complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action, and that the statute of limitations had run against the action. This demurrer was sustained by the court.

We think that every question presented in this case has been decided in the two decisions above referred to contrary to the appellant's contention. But, in any event, this is an action upon a statutory bond. The debt was contracted March 20, 1903, and suit begun May 7, 1906. So that, under the rule announced by this court in *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. 733, and *Dickman v. Strobach*, 26 Wash. 558, 67 Pac. 224, the statute of limitations had run and the claim was barred.

The court did not err in sustaining the demurrer to the complaint, and the judgment will be affirmed.

[No. 6666. Decided June 15, 1907.]

CRANE COMPANY, *Respondent*, v. S. C. FARNANDIS *et al.*,
Appellants.¹

MECHANICS' LIENS—DELIVERY OR USE OF MATERIALS—EVIDENCE. A judgment foreclosing a mechanics' lien must be reversed, where there was no testimony tending to show that the materials were delivered or furnished for use in the building or that they were so used.

Appeal from a judgment of the superior court for King county, Griffin, J., entered August 7, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

Allen, Allen & Stratton, for appellants.

George H. King, for respondent.

PER CURIAM.—This is a suit to foreclose a mechanics' lien on the property of the appellants. Ryan & Knapstein, the contractors to whom the goods were alleged to have been sold, made no appearance. Judgment was entered for the foreclosure of the lien in the amount of \$46. From this judgment this appeal is taken.

The answer denied the furnishing of the material by the plaintiff. The two principal contentions of the appellants are, (1) that they were authorized by the respondent to pay the contractors the full amount of their claim; and (2) that the goods for which the lien was filed were not delivered for use in the building of the appellants, and were not used in the construction of said building. On the first proposition there is a direct conflict in the testimony. An examination of all the testimony in the case convinces us that there is not sufficient testimony that the goods were furnished for use, or were used, in the construction of the appellants' building. The

¹Reported in 90 Pac. 1134.

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appellants rely upon the case of *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1, 85 Pac. 677, where it was said by this court that, "while the testimony as to the delivery of the material and its use in the buildings is not as clear and satisfactory as it might be, yet there was competent evidence tending to show these facts, and in the absence of any testimony to the contrary, we would not be warranted in disturbing the findings of the court below."

The case at bar does not come within this liberal rule, for without specially reviewing the testimony, which in large part is immaterial, we are unable to find competent testimony tending to show that the material was furnished for use in the building, or was so used. The person who, it is claimed, delivered the material, was not produced in court, nor his testimony furnished in any way; and while it is true that the most convincing testimony might not be required in a case of this kind, there must be some testimony tending to show the furnishing and the use of the materials for which the lien is claimed. No such testimony having been offered in this case, the judgment must be reversed, and the cause remanded with instructions to dismiss the action.

[No. 6623. Decided June 17, 1907.]

OLE P. NORGREN *et al.*, *Respondents*, v. J. EUGENE JORDAN
et al., *Appellants*.¹

CANCELLATION OF INSTRUMENTS—FRAUD—COMPLAINT—SUFFICIENCY. A complaint in an action to cancel an assignment of a school land contract and to quiet title, alleging the assignment by plaintiffs to one of the defendants of the contract for the land, which was agreed to be held in trust to secure advances to be made by such defendant, the breach of the contract by him, and that he was about to fraudulently convey the same to the other defendants, states a cause of action.

¹Reported in 90 Pac. 597.

SAME—PLEADING—TENDER—NECESSITY. The complaint in an action to cancel the assignment of a school land contract, assigned in trust to secure advances, is sufficient without alleging a tender of the advances, where it appears that a tender would have been futile and the complaint alleges a readiness to repay all advances and interest.

SAME—AMENDMENT OF PLEADING—APPEAL—HARMLESS ERROR. A complaint in an action to cancel the assignment of a school land contract, assigned to secure advances, is sufficient without alleging that the assignment was intended as a mortgage; and requiring an amendment to that effect is harmless error and the amendment immaterial.

SAME—GROUNDS—FRAUD—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY. An assignment of a school land contract, as security for the repayment of advances to be made, is not shown to be fraudulent as to creditors by reason of recitals in an instrument claimed to have been contemporaneous and dictated by the debtor making the assignment, when it appears more likely to have been made subsequently and drawn up by the assignee and misunderstood by the debtor, and where the creditors were informed of and consented to the assignment, and the assignee had agreed with all the principal creditors to advance money to pay their claims.

HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY OF HUSBAND—TRUST—VENDOR AND PURCHASER—BONA FIDE PURCHASER. Where a trustee held a school land contract belonging to a community as security for future advances to be made, the written consent of the husband, not joined in by, and concealed from, the wife, that a conveyance might be made by the trustee to a third person, is insufficient to authorize the conveyance or to make such third person a *bona fide* purchaser.

VENDOR AND PURCHASER—BONA FIDES—EQUITABLE INTERESTS. Upon assignment of an equitable interest in land as security for the repayment of future advances, the assignees cannot be in the position of *bona fide* incumbrancers, without notice, as the doctrine of protection of *bona fide* purchasers applies only to purchasers of the legal title.

CANCELLATION OF INSTRUMENTS—DEFENSES—TRUSTS—ACCOUNTING—EVIDENCE OF PAYMENTS—SUFFICIENCY. In an action to set aside an assignment of a school land contract held in trust to secure advances, the evidence is insufficient to support a claim that \$2,000 was paid by the trustee upon taking the assignment, where the assignor claims that no payment was made, the assignment recited a consideration of one dollar, the assignee, who was a shrewd litigious business man, made no examination of the title, agreed to pay the debts of the

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Opinion Per RUDKIN, J.

assignor in excess of the amount paid on the contract, and took a receipt indicating that the transaction was absolutely fraudulent as to creditors, the alleged payment of \$2,000 being for interests amounting to but a mere shadow.

SAME. The evidence is insufficient to support a claim that \$500 was paid by a trustee holding an assignment of a school land contract to secure advances, where it was alleged that the sum was paid in currency to a broker for securing a sale of part of the lands, when no sale was effected and the commissions were never earned and the other evidence fails to support the claim.

Cross-appeals from a judgment of the superior court for King county, Rice, J., entered July 11, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed on plaintiffs' cross-appeal.

Jay C. Allen, for appellants.

Kerr & McCord and *J. L. Finch*, for respondents.

RUDKIN, J.—In the month of December, 1904, the plaintiffs in this action were desirous of purchasing from the state the forty acres of school land now in controversy, upon which they had resided for upwards of twelve years. At that time they were indebted to Eric Ulin in the sum of \$1,475, on account of moneys advanced to enable them to acquire the interest of former occupants of the land and for other purposes. Ulin had further agreed to advance the first payment on the contract with the state for the purchase of the land, but for reasons not disclosed by the record, the advances were not made, and the plaintiffs were compelled to look elsewhere for financial aid. With that object in view, they entered into a contract with Nelson Chilberg on the 17th day of December, 1904. This contract, after reciting the fact that the plaintiffs were indebted to Ulin in the sum of \$1,475, the fact that they were desirous of purchasing the school land in question, which was to be offered for sale two days later, and the fact that the plaintiffs desired an advance on the land to the amount of \$2,500, to pay off and satisfy the Ulin indebtedness and to

make the initial payment on the contract with the state, contained an agreement on the part of Chilberg to advance the sum of \$2,500 on the property, and an agreement on the part of the plaintiffs to give their promissory note for that amount, secured by a mortgage on the school land as soon as the contract of purchase was entered into. Pursuant to this agreement, the school land was bid in by the plaintiffs, or in their behalf, on December 19, 1904, for the sum of \$5,440, payable in ten annual installments, and the first payment of \$540 was made by Chilberg as agreed. On the same date the plaintiffs executed and delivered their promissory note and mortgage to Chilberg in fulfillment of their part of the agreement. Chilberg then gave Ulin, or the representative of his estate, a check or order for the amount of the Ulin claim, payable on some contingency, the exact nature of which does not appear. The Ulin claim was not paid, however, nor were any further advances made under the mortgage, with the exception of \$50 or \$60. The reason for this default, if default it was, is not material on this appeal.

In the early part of March, 1905, the plaintiffs were requested to make an assignment of the school land contract to Chilberg, accompanied by a supplemental agreement reciting the purpose for which the assignment was made, but after consulting with their attorney, and with the defendant Morrow, the plaintiffs refused to make such assignment. Soon thereafter, and on the 14th day of March, 1905, the plaintiffs made an assignment absolute in form of the school land contract to the defendant Jordan. The purpose of this assignment and the conditions upon which it was made we will consider later. On the 18th day of April, 1905, the defendant Jordan entered into a contract of sale with the defendant Lizzie G. Thomas, wherein he agreed to convey to her the entire tract, less 4.6 acres theretofore conveyed to other parties. This action was thereupon brought by the plaintiffs to set aside the assignment of the school land contract from the plaintiffs to the defendant Jordan, and to quiet title in the

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plaintiffs as against the defendants Jordan and the Thomases, on the ground of fraud in procuring the assignment and in the subsequent disposition of the property. The issues in the case will sufficiently appear from a discussion of the points involved on the different appeals. The court below made findings of fact and conclusions of law, and by its judgment directed a reassignment of the school land contract to the plaintiffs, upon their paying into the registry of the court the sum of \$3,556 for the use of certain of the defendants. From this judgment both parties have appealed.

We will first consider the errors assigned by the defendants. At the commencement of the trial an objection was interposed to the introduction of testimony under the amended complaint, for the reason that it did not state facts sufficient to constitute a cause of action. The refusal of the court to so rule is the first error assigned. The amended complaint alleged, in substance, that the plaintiffs were the equitable owners of the land on a certain date, and were indebted to diverse persons in the sum of about \$2,000; that the defendants Jordan and Morrow falsely and fraudulently represented to the plaintiffs that if the plaintiffs would assign the school land contract to the defendant Jordan, the defendant Jordan would advance sufficient sums to pay the plaintiffs' indebtedness as the same became due, and their living expenses until such time as they could sell a portion of the land to advantage; that relying on these representations, the plaintiffs did assign the school land contract to the defendant Jordan; that the defendant Jordan never intended to advance money to pay the plaintiffs' indebtedness, or for any other purpose, except such sums as were absolutely necessary to allay their suspicions; that he refused to advance any money to pay the plaintiffs' said indebtedness as agreed, and only advanced for their living expenses about the sum of \$410; that he refused to make further advances and had entered into an agreement to convey the property to the Thomases for the purpose and with the intent of defrauding the plaintiffs and placing the property beyond their reach,

and that the plaintiffs were ready and willing to repay to the defendant Jordan all sums advanced with legal interest. It seems to us that this complaint clearly states a cause of action. If it be conceded that the refusal of the defendant Jordan to make the advances, as agreed, was a mere breach of contract and not a fraud in law, even though he never intended to fulfill the agreement, the fact remains that the property was conveyed to him in trust and he will not be permitted to hold it in violation of that trust.

It is further contended in support of this objection that the amended complaint failed to allege a tender of the moneys actually received by the plaintiffs. Aside from the fact that the answer of the defendants showed that a tender would be futile, the complaint alleged readiness and willingness on the part of the plaintiffs to repay all advances with legal interest, and this allegation fully satisfied the requirements of the law. The ruling of the court in permitting the plaintiffs to amend their complaint by alleging that the assignment of the contract was intended as a mortgage, and praying for a foreclosure, is also assigned as error. This amendment was proposed simply because the court had intimated that the complaint was deficient without it. In this we think the court was in error. The amendment was unnecessary and immaterial and could not be prejudicial.

It is next contended that the assignment from the plaintiffs to the defendant Jordan was executed for the purpose of hindering, delaying and defrauding the plaintiffs' creditors, and that a court of equity should leave the parties where it finds them. This contention is based largely on the recitals contained in a memorandum, signed by the plaintiffs and the defendant Jordan, bearing the same date as the assignment of the school land contract. The defendant Jordan contends that this memorandum was executed at the same time as the assignment, that he prepared an instrument reciting the terms and conditions under which he held the assignment, that such instrument was not satisfactory to the plaintiff Ole

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P. Norgren, and that said Norgren thereupon dictated the instrument in question as a substitute, and the same was duly executed by all parties. The plaintiffs, on the other hand, contend that they executed an entirely different agreement at the time of making the assignment, and that such instrument was thereafter obtained from them by the defendant Jordan on some pretext or another, and the present agreement substituted in its place. Aside from the direct testimony bearing upon this question, there is much in the record that tends to sustain the contention of the plaintiffs. The instrument was confessedly read over and signed by the defendant Jordan, at the time of its execution, and yet it recites facts which he testified positively that he had no knowledge of until several days after the assignment was made. Again, while this unique and formal instrument may have been dictated by an ignorant, illiterate Swede, such as Norgren is shown to be, yet to the ordinary observer it looks like the product of a more crafty mind. Furthermore, the record as a whole shows that the recitals in the instrument are absolutely false, and that the plaintiffs at no time intended or attempted to hinder, delay or defraud any of their creditors. The time or manner of the execution of the instrument is therefore immaterial, except insofar as that fact may tend to establish the charge of fraud and conspiracy against the defendants.

Who were the creditors to be defrauded? The principal creditor was the Ulin estate. The plaintiffs had already made provision for the payment of this claim in their mortgage to Chilberg, and it was through no fault of theirs that it was not paid. Whether it was, in fact or in law, secured by the Chilberg mortgage, we need not inquire. Some time after the assignment was made, the plaintiff Ole P. Norgren and the defendant Jordan called on Mrs. Ulin, the present holder of the claim, to ascertain whether she made any claim against Chilberg under the mortgage by reason of the facts we have alluded to, and she was then assured by the defendant Jordan that he would pay her claim. The next creditor in amount

was Chilberg. He was secured by mortgage, and it was expressly agreed that Jordan should pay him. The only other creditor to any considerable amount was Calvert. Norgren took him to Jordan and told him that Jordan would pay him. Every creditor was fully informed of the assignment from the Norgrens to Jordan, and of the purpose for which the assignment was made. There was no concealment and it is a significant fact that no creditor has complained or is now complaining. The assignment itself recites the nominal consideration of \$1, an unusual recital in a transfer in fraud of creditors, and as stated above, the record rebuts even the slightest inference of fraud on the part of the plaintiffs.

It is next contended that the plaintiffs authorized the conveyance to the Thomases and that the latter are *bona fide* purchasers. There appears in the record a written consent to the sale, signed by Ole P. Norgren alone, but whether this was executed voluntarily or obtained through fraud we need not inquire. The property was the community property of the plaintiffs. Jordan held the property in trust and had no power to sell without their consent. The consent of the wife was never given, and the fact of the husband's consent was carefully concealed from her. The contract from Jordan to the Thomases was therefore unauthorized. The form of the contract itself, and all the surrounding circumstances, show that the Thomases were not *bona fide* purchasers as a matter of fact, and they could not be such as a matter of law.

"Appellants further contend that they stand in the position of *bona fide* encumbrancers without notice. This does not avail them anything. The most which the mortgage could encumber was an equitable estate in Abbott & Griffiths. The doctrine which protects *bona fide* purchasers without notice is applicable solely to purchasers of a legal title; and the purchaser of an equitable interest purchases at its peril, and acquires the property burdened with every prior equity charged upon it." *Shoufe v. Griffiths*, 4 Wash. 161, 30 Pac. 93, 31 Am. St. 910, and cases cited.

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The record shows conclusively that the assignment was made to Jordan as security for future advances; that such advances have only been made in part; that Jordan has attempted to dispose of the property in violation of his trust, and in utter disregard of the rights of the *cestui que trust*, that the Thomases stand in no better position, and the judgment against them must be affirmed.

The plaintiffs have excepted to the allowance of several items charged against them by the court below, and have prosecuted a cross-appeal. These items we will now consider. The first in importance is an item of \$2,000 which Jordan claims he agreed to pay and did in fact pay at the time of the assignment. This payment is denied by the plaintiffs. The assignment itself recites a consideration of \$1. The agreement which the defendant Jordan claims was executed on the same day recites, "That all of said property be deeded and transferred by said Norgrens to the said Jordan as a means of protection to the said Norgrens against any and all of their creditors and for the purpose of keeping the said creditors from getting said property and collecting said debts and taking the same away from the said Norgrens. The said Jordan proposes in the meantime to assist the said Norgren financially in order to support and maintain himself and family until such time as the said Norgren may be able to support himself and family, to which financial aid the said Norgrens are in urgent need"; but is entirely silent as to any payment of \$2,000. The \$2,000 paid was taken from a sideboard or cupboard in the defendant Jordan's office, while other small payments not in dispute were made through Dexter Horton & Co. bankers. The receipt for the payment is a suspicious looking document on its face. Jordan is a shrewd business man, has been a party to about fifty lawsuits during his residence in Seattle—"all prosecuted by blackmailers" if you please—and has been a party to business transactions involving hundreds of thousands of dollars. The plaintiffs had purchased the school land at public auction less than three

months before, and had paid but \$540 on the purchase price. Jordan assumed and promised to pay the Chilberg indebtedness, which was in excess of \$600. He made no examination of the title, nor of the land itself so far as the record discloses. The plaintiffs were largely indebted and Jordan took an assignment of the property for the purpose of defrauding creditors. In order that there might be no mistake or misunderstanding about it, he signed a written memorandum to that effect. Assuming an indebtedness in excess of the amount paid by the plaintiffs for their equity, knowing nothing of the title to the property or of the property itself, knowing that he could not hold the property against the creditors of the plaintiffs, yet he would have us to believe that he paid \$2,000 for a mere shadow. When we consider all these circumstances, his claim is unreasonable and must be disallowed.

The next item in importance is \$500, alleged to have been paid to the defendant Morrow by the defendant Jordan at the instance of the plaintiff Ole P. Norgren, as a commission for finding a purchaser for a portion of the land. The alleged purchaser stopped payment on the check given in part payment of the purchase price, and refused to enter into a contract of purchase, without fault on the part of the plaintiffs or any other person, so far as the record discloses. The commission was never earned and the only excuse for its payment is the direction alleged to have been given by Ole P. Norgren. This claim like the former was paid in currency and is evidenced by a similar receipt. We find it not supported by the testimony and the same is disallowed.

The next items in dispute are two payments of \$100 each, alleged to have been made to the plaintiffs on account of the sale of two acres of the land to one Giles. One of the items was paid, but in our opinion the other was not, and is disallowed. The items of \$4.25 and \$25, expenses of a trip to Everett, are not shown to have any connection with the case and are disallowed. Certain items for expenses to Olympia and for attorney's fees in securing the approval of the assign-

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ment of the contract by the commissioner of public lands are questioned, but these expenses were incurred with the knowledge and approval of the plaintiffs and the items will be permitted to stand. The other items in dispute are too small in amount to warrant discussion.

We will add, in conclusion, that in our opinion the following payments and disbursements only are established by the testimony:

March 16, 1905.....	\$50.00
March 16, 1905.....	5.85
March —	20.00
March 28,	24.00
March 28,	6.00
March 29,	100.00
April 1,	40.00
April 8,	5.00
April 12,	25.00
May 5,	20.00
May 9,	10.00
May 9,	75.00
May 29,	25.00
June 19,	24.00
June 19,	5.00
July 1,	25.00
Nov. 13,	100.00
Nov. 17,	75.00
Feb. 26, 1906.....	299.16
March 1,	83.00
May 20,	36.00

We desire to add a word as to the \$200 received on the Giles contract. Giles is not a party to this action and the validity of his contract as against the plaintiffs cannot be determined. Inasmuch as he was not made a party, we presume the plaintiffs do not question his rights. If they do not, and make that fact appear of record in the court below, they will be entitled to an additional credit of \$100, being the amount of the pur-

chase price retained by Jordan. If they refuse to confirm the contract, \$100 should be added to the above amounts, as they will not be permitted to disaffirm the sale and at the same time claim the benefits arising from the sale.

For the reasons herein stated the judgment of the court below is reversed, with directions to enter a decree directing a reassignment of the school land contract to the plaintiffs and quieting their title as against the defendants, upon the payment of the several sums above mentioned, with legal interest from date of each payment. The \$200 received on the Giles contract will be disposed of as above indicated. The plaintiffs will recover their costs in this court.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6704. Decided June 17, 1907.]

JOHN E. PETERSON, *Respondent*, v. M. LARA, *Appellant*.¹

JUDGMENT—VACATION—RECITALS—PRESUMPTIONS. Where a judgment recites due service of process, and the record shows jurisdiction, an application to vacate the judgment, on the grounds that the service was by publication and the court without jurisdiction, is demurrable, as the presumption of jurisdiction is not overcome by defects in the record.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 28, 1906, upon sustaining plaintiff's demurrer, dismissing an application to vacate a tax judgment. Affirmed.

S. S. Langland, for appellant.

Chas. P. Harris, for respondent.

¹Reported in 90 Pac. 596.

June 1907]

Opinion Per RUDKIN, J.

RUDKIN, J.—On the 16th day of October, 1903, judgment was entered in the court below in a tax foreclosure proceeding entitled: "John E. Peterson vs. Investors' Trust Company, a corporation, American Loan and Trust Company, a corporation, and all persons unknown, if any, having or claiming an interest or estate in or to the hereinafter described real property." The judgment contains the following finding or recital as to the service of process: "That notice and summons has been duly served on the defendants in this action, as required by the statutes of this state, and that each and every requirement of the statutes has been complied with, entitling the plaintiff to a judgment and decree herein." On August 28, 1906, one Marcellus Lara appeared specially in the action and moved the court to vacate and set aside the tax judgment. The only ground stated in the motion or accompanying affidavit was that service was made by publication, and that it appeared from all the records, files and proceedings in the cause that the court was without jurisdiction to render or enter the judgment. The plaintiff in the action appeared and demurred to the application for the reason, among others, that the motion and accompanying affidavit did not state facts sufficient to entitle the moving party to any relief. The demurrer was sustained, and from the judgment of dismissal, the present appeal is prosecuted.

The demurrer was properly sustained. The fact that service is made by publication is no ground for setting aside a tax judgment, as such service is authorized in a proper case, and there is no showing that it was not authorized here. Nor does it appear from the records, files and proceedings that the court was without jurisdiction. If it be conceded that the affidavit for service by publication was defective, and this is the only objection urged against the jurisdiction, yet the judgment recites that due service of process was made, and in such cases the presumption of jurisdiction is not overcome by any defects in the record. This question has been decided so often that it is no longer an open one in this court. *Nolan v.*

Arnot, 36 Wash. 101, 78 Pac. 463, and cases there cited. Inasmuch as the application is insufficient on its face, we will not consider the other questions discussed in the briefs of counsel.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 8715. Decided June 17, 1907.]

JACOB MADES *et al.*, Respondents, v. CONRAD HOWALDT,
Appellant.¹

LANDLORD AND TENANT—ORAL LEASE—TENANCY FROM MONTH TO MONTH—TERMINATION—NOTICE. An oral lease for the term of one year, with monthly rent reserved, payable in advance, creates a tenancy from month to month, and may be terminated by proper notice given the requisite time before the end of any month.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 13, 1906, upon the verdict of a jury in favor of the plaintiffs by direction of the court, in an action of forcible entry and detainer. Affirmed.

E. F. Kienstra, for appellant.

Geo. McKay and *Thos. B. MacMahon*, for respondents.

RUDKIN, J.—On the 1st day of June, 1906, the plaintiffs made an oral lease of the premises in controversy to the defendant for the term of one year from that date, at a rental of \$7 per month, payable monthly in advance. At the time of making the lease, the defendant paid the first month's rent, and entered into possession of the demised premises. On the 2d day of July following, the monthly rental for July was paid, and on the same date the plaintiffs served a written no-

¹Reported in 90 Pac. 588.

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Opinion Per RUDKIN, J.

tice on the defendant requiring him to vacate and surrender possession on August 1st. The defendant refused to comply with the requirements of this notice, and the present action was instituted, under the forcible entry and unlawful detainer statute, to recover possession and for double damages. The case came on for trial before a jury, but as soon as the nature of the lease was disclosed, the court determined, as a matter of law, that the defendant was a tenant from month to month only; and, it appearing that the tenancy had been terminated in the manner provided by law, a judgment was directed in favor of the plaintiffs. From that judgment the defendant appeals.

In *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934, it was held that, "If an oral contract of lease is good at all, it must come under § 4569 [Bal. Code], and be construed to be a lease from month to month, and then only where the tenant has been put into possession."

In *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, the court said:

"An oral lease, therefore, where possession of the property has been taken, is not void *in toto*, but it may not be a lease for the term agreed upon. If the rent reserved is to be paid periodically it is a lease good for one of such periods, but subject to be terminated at the end thereof, or at the end of any other of such periods. Thus, under the statute, where one enters into the possession of real property under an oral lease for a definite time with periodic rent reserved, he is not a tenant for the time agreed upon, but a tenant from period to period, corresponding to the times on which rent is payable. Such a lease can be terminated, as the statute provides, by written notice given at the prescribed time before the end of such period."

In this case the lease was oral, the rent reserved was payable monthly, and the tenancy might be terminated by proper notice given the requisite time before the end of any month. The court below properly ruled, therefore, that the appellant was holding over unlawfully after the termination of his ten-

ancy. The appellant further contends that the court allowed double damages for the July rent which had already been paid. The contrary appears from the record. The final judgment was entered on October 13th, and the court computed the rental at the stipulated rate of \$7 per month for two months and thirteen days, or from August 1st to October 13th.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6774. Decided June 17, 1907.]

JULIUS SAHLIN *et al.*, *Respondents*, v. T. G. GREGSON *et al.*,
Appellants.¹

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. An absolute deed is not shown, by clear and satisfactory evidence, to be a mortgage, where only the grantor testified to that effect and he was contradicted by three witnesses, part of whom were disinterested, and where the grantor took the precaution to reserve a gravel bed embracing but a small proportion of the land, which would probably not have been excepted had the transaction been a loan.

SAME—INADEQUACY OF PRICE. In an action to reform a deed of a one-half interest in land, claimed by plaintiff to be a mortgage to secure \$100, inadequacy of such sum as a purchase price is not shown, where it appears that the whole property was subject to a mortgage for \$1,500, which was at least two-thirds of its value; that previously, but subsequent to the mortgage, the grantor had conveyed a one-half interest in the property by warranty deed, which might throw the whole burden of the mortgage on the half interest in question; and where, after the giving of the deed in question, the other half interest was sold for \$300, there having meantime been an increase in values.

¹Reported in 90 Pac. 592.

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Opinion Per RUDKIN, J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 5, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to cancel a deed. Reversed.

McCafferty & Bell, for appellants.

Blaine, Tucker & Hyland, and *W. L. Read*, for respondents.

RUDKIN, J.—The plaintiffs in their complaint alleged that a certain warranty deed, executed by them to the defendant Jurich, was intended as a mortgage to secure a loan of \$100; that the amount of the loan with legal interest was tendered, and that the defendants refused to accept the tender or reconvey the property. The prayer was that the deed in question, together with certain other deeds subsequently executed by the grantee, be annulled and cancelled. The court below gave judgment according to the prayer of the complaint, and from such judgment the present appeal is prosecuted.

If this judgment is permitted to stand, deeds and other written instruments have lost their chief virtue. The only testimony offered tending to show that the deed was intended as a mortgage, or was given as security, was that of one of the grantors, Julius Sahlin. As against this, there was the direct and positive testimony of three witnesses, some of whom, at least, have no apparent interest in the outcome of the action. But if the respondents' testimony stood alone and uncontradicted, it may well be doubted whether it was legally sufficient to sustain a judgment in an action of this kind where clear and satisfactory proof is indispensable. On the day the deed was executed, the respondent Julius Sahlin was on his way to Snohomish county on some timber deal out of which he expected to make a commission of \$500. He was so far in need of funds to defray the expenses of his trip that he was willing to give the appellant Gregson \$25 to procure a temporary loan of \$100. He met Gregson fortuitously on

the streets of Seattle, and they at once repaired to a nearby saloon to get a drink. Without any solicitation on Sahlin's part, and without any apparent knowledge on the part of Gregson as to his financial stress, Gregson reminded Sahlin that some time before he had told him to come to him if in need of money; that he could get money for him on his property. Sahlin took advantage of this timely offer, and the deed now in controversy was the result.

It is not claimed that Gregson represented the purchaser, unless it be inferred from their prior relations, or from the fact that an undivided one-fourth interest in the property was transferred to Gregson's wife within a few hours after the execution of the Sahlin deed. The purchaser was not present at the time of the execution of the deed, but was represented by his attorney, who prepared the deed and paid the consideration. Sahlin admits that nothing was said about a loan in the presence of the purchaser's representative, but contends that it was stated in his presence that he should have an option to repurchase the property within thirty days. This the attorney refused to give, as it would convert the transaction into a mortgage. Sahlin contends that it was then orally agreed that such reconveyance should be made, but as stated above, all this is denied by three witnesses. Sahlin admits that he read the deed, knew its contents, and knew the difference between a deed and a mortgage. Furthermore, at the time of the execution of the deed, he insisted that a gravel bed embracing from three to five acres should be reserved from the grant. That such a reservation should be made in a deed given to secure a temporary loan for a small amount is somewhat singular. It doubtless seemed so to Sahlin, for he attempted to explain the reservation by stating that the gravel bed had been reserved in prior transactions, yet, he admitted, and the record shows, that it was included in the two mortgages on the property and in the deed of an undivided one-half interest theretofore executed to Carlson and Johnson. In fact, it was

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included in all prior transactions, except an agency contract entered into with a real estate dealer.

The respondents urge that the consideration paid was grossly inadequate. The consideration is no doubt an important element in cases of this kind, but let us examine the facts. The property was subject to two mortgages aggregating the sum of \$1,500. Whether there was any accrued interest does not clearly appear. It was also subject to two years taxes which, with interest, would approximate \$50. The Sahlins had conveyed an undivided one-half interest in the property to Carlson and Johnson by deed of general warranty, except as to the two mortgages. It does not appear that the grantees assumed any portion of the mortgaged indebtedness; and under such circumstances it may well be doubted whether, as between the respondents and their grantees, the half interest retained would not have to be first subjected to the payment of the mortgage debt. If so, the respondents' equity in the property was valueless. But for the purposes of this case we will assume that it was the duty of all parties in interest to contribute *pro rata* towards the payment of the mortgage indebtedness. The total encumbrance in the entire property would therefore be \$1,550 at the very least.

On the 3d day of March, 1906, twelve days before the execution of the deed in controversy, the respondents granted a certain real estate agent the exclusive right to sell the property for a period of thirty days for \$2,300 net to them. This was for the entire property free from encumbrances, not the undivided interest held by the respondents. No purchaser was found until after the conveyance to the appellants, nor until after the announcement was made that the Chicago, Milwaukee and St. Paul Railroad intended to come down Cedar river in close proximity to the land. This announcement had a marked effect on the value of property in that vicinity, and was made after the conveyance to the appellants. It further appears that Carlson and Johnson sold their undivided one-

half interest for \$300 on March 24, 1906, and there was unquestionably an increase in the value of the property between the 15th and 24th of March. We are safe in saying therefore, that the value of the property did not in any event exceed the amount asked for it by the respondents, and that their undivided interest in the equity would not exceed in value three or four hundred dollars at the outside. But an interest of that kind is not salable. Few persons would purchase an undivided one-half interest in property, encumbered by mortgages for two-thirds of its entire value, unless they had or could make arrangement to purchase the remaining interests. If the respondents had such arrangements they did not avail themselves of it here. The purchaser might be compelled to lift the entire mortgage indebtedness and then resort to an action for contribution—an action he might fail in, in this case, for reasons already stated. If the purchaser should be compelled to engage in litigation to protect his rights, the costs and expenses would soon consume the small equity in the property. For these reasons it cannot be said that the consideration was so inadequate as to raise any presumption one way or the other. If the sale of such an interest for a consideration of \$100 would seem unreasonable, the taking of such security for a loan of \$100 would seem equally so. The inference that the respondents are attempting to avail themselves of the increase in value and a better offer, is just as strong as any inference that might arise from the inadequacy of price.

On the entire record we are constrained to hold that the respondents have utterly failed to show that the deed is other than it purports on its face to be, and the judgment is reversed with directions to dismiss the action.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

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Opinion Per DUNBAR, J.

[No. 6663. Decided June 17, 1907.]

HARRIET A. ERVAY, *Respondent*, v. ALBERT E. HILL *et al.*,
Appellants.¹

EXECUTIONS—SALE—NOTICE—OBJECTIONS—RETURN. Objection to an execution sale, on the ground that notice of the sale was not given as required by statute, cannot be made where the sheriff's return shows substantial compliance with the statute.

EXEMPTIONS—LIABILITY OF AGENTS—STATUTES. An action to recover money paid to a spiritualistic medium, secured by fraud and false representations as to communications received from plaintiff's deceased husband directing the plaintiff to pay the money to the defendant, is not an action to recover on a liability incurred by an attorney or agent for money of his client or principal coming into his hands, within Laws 1901, p. 323, providing that no property shall be exempt from execution on such a liability.

SAME—HOMESTEADS—STATUTES—IMPLIED REPEAL. Laws 1901, p. 323, amending Bal. Code, § 5284a, and providing that "no property" shall be exempt from liability incurred by an attorney or agent on account of money of his client or principal coming into his hands, has no application to homestead exemptions, as Bal. Code, § 5248a, refers only to personal property exemptions, and the repeal of a specified section does not repeal by implication other sections embracing other subject-matter.

Appeal from an order of the superior court for Snohomish county, Black, J., entered October 22, 1906, confirming a sale of property on execution and refusing to allow a homestead exemption therein. Reversed.

J. H. Naylor and Merrick & Mills, for appellants.

DUNBAR, J.—This is an appeal from an order of the superior court of Snohomish county, confirming a sale of certain lands, the property of the judgment debtors, and refusing to allow a homestead exemption on said lands. The original complaint, upon which the judgment was obtained, was, in substance, that the plaintiff and her husband at the time of his

¹Reported in 90 Pac. 590.

death were believers in the faith commonly known as "spiritualism," one of the tenets of which is that it is possible for persons, through the intervention of another person known as a spiritual medium, to communicate with the spirits of departed persons; that immediately prior to the death of plaintiff's husband, he transferred and set over to plaintiff, as her sole, separate property, all of the real and personal property then owned by him, either as his separate property or as the community property of himself and plaintiff; that the plaintiff was the sole owner of the said property above referred to, which was well known to the defendants; that immediately following the death of her husband the defendants unlawfully, fraudulently, and wickedly entered into a conspiracy to cheat and defraud the plaintiff out of her said property and to appropriate the same unlawfully and fraudulently to their own use, and to that end fraudulently represented to the plaintiff that the said defendant Albert E. Hill was himself a *bona fide* believer in the spiritualistic faith; that he was a spiritual medium, endowed with the faculty of communicating with the spirits of deceased persons; that he had had a communication with the spirit of plaintiff's deceased husband, in which the spirit of the said deceased husband, speaking through the said Hill, had communicated to the defendant Hill a desire that she, said plaintiff, should donate to the defendants the sum of \$2,500 for their use and benefit; and that, believing in said representations, she paid to the defendant Albert E. Hill the sum of \$1,045, and surrendered to the said Hill one certain promissory note in the sum of \$100, held by her against said Albert E. Hill, in evidence of a just obligation then owing to her by said Albert E. Hill; that shortly thereafter the defendant Hill claimed to have had another communication with the spirit of the deceased husband of the plaintiff, in which the spirit of the husband, speaking through the defendant Albert E. Hill, advised plaintiff to execute and deliver to said defendant a general power of attorney to transact her business; that in response to

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said asserted communication, such power of attorney was executed and that, acting under such power of attorney, the defendant Hill wrongfully obtained from the plaintiff the sum of \$717.88; that the defendants have wholly failed to account to the plaintiff for any part of said money so obtained; that the representations made by the said defendants as to the spiritualistic power of the said Albert E. Hill were false and made for the purpose, and with the intent, of defrauding the said plaintiff; that by reason of the premises she has sustained damages in the amount of \$1,862.88; and prays judgment against the defendants for damages in that sum, together with her costs and disbursements.

The record does not show the answer, if any was filed in this case, but does show that a trial was had before a jury, and verdict returned in favor of the plaintiff for the sum of \$1,862.88, and that a judgment was entered in accordance with said verdict for that amount, together with costs and disbursements. Execution was issued upon this judgment, and sale was effected. When the confirmation proceedings were had, the judgment debtors, appellants here, objected to the confirmation upon the two grounds, (1) that the notice required by statute for the sale of the land sold by the sheriff had not been properly given, and (2) that certain of the lots were subject to homestead exemption. These objections were overruled by the court, and the sale was confirmed as to all of the land.

We think the first contention of the appellants cannot be sustained, as the return of the officer shows that the law in regard to the notice in such cases made and provided was substantially complied with. The second contention, however, viz., that the court erred in holding that lots 21 to 26 inclusive, in block 87, of the plat of Edmonds, was not subject to homestead exemption, must be sustained. The court found, that prior to the sale of said lots they had been legally selected by the appellants; that the legal and proper declaration had been made; that upon their application appraisers

had been duly appointed and qualified; that they had duly and legally appraised and set aside said lots to the judgment debtors as and for the homestead of said judgment debtors; that the judgment debtors had resided upon and occupied said lots as their homestead continuously for more than five years next preceding the rendition of the judgment against them; that they were still residing upon said lots as a homestead; and, in short, found that said lots comprised the homestead of the judgment debtors; but that, notwithstanding this, the same was not exempt from the lien of the execution, for the reason that it further appeared to the court that the judgment herein, upon which said execution was issued and upon which said sale was had, was founded upon a liability incurred by the defendants and judgment debtors as agents of the plaintiff on account of moneys coming into their hands from and belonging to said plaintiff and judgment creditor; and that, by reason of that fact, none of the facts before found by the court as to the homestead right of the appellants, constituted any legal objection to the confirmation of the sale of the property. The conclusion of the court was evidently based upon a construction of chapter 158 of the Laws of 1901, page 323, which is as follows:

"Section 1. That section 5284a of Ballinger's Annotated Codes and Statutes of Washington, relating to exemptions, be and the same is hereby amended to read as follows: Sec. 5248a. No property shall be exempt from execution for clerk's, laborer's, or mechanic's wages, earned within this state, nor shall any property be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys, or other property coming into his hands, from or belonging to his client or his principal."

It does not seem to us that the allegations of the complaint bring it within the meaning of the statute. There is no attempt to recover moneys received by the defendant in a trust or fiduciary capacity. There is no claim that the money was

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received for the benefit of the plaintiff. In fact, the claim is exactly the reverse of this. The allegations are all of fraudulent representations and conspiracy to defraud. It must, therefore, be construed to be a simple action for damages for fraudulent representations.

But, in addition to this and waiving any question of the constitutionality of the amendatory act, it is apparent that the amendment does not in any way affect the law providing for the exemption of homesteads. An examination of the section amended shows that it has no reference to the subject of homestead exemptions, but is applicable only to exemptions of personal property. The legislative announcement is that section 5248a be amended, and while the comprehensive words "no property" are used in the act, such words must be construed as referring only to the character of property described in the section amended. In this country exemptions are favored by the law, especially homestead exemptions; and it would be doing violence to the spirit of the law and to all well-recognized canons of construction to hold that the repeal of the provisions of a specified section repealed by implication other sections of the same chapter, the subject-matter of which was not embraced in the section amended.

The judgment will be reversed, and the cause remanded with instructions to allow the appellants a homestead upon the lots above referred to.

HADLEY, C. J., ROOT, MOUNT, RUDKIN, and CROW, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 6600. Decided June 20, 1907.]

ABBY BOCK, *Respondent*, v. BARBARA SANDERS *et al.*,
Appellants.¹

JUDGMENTS—RECITALS—SERVICE OF PROCESS—PRESUMPTIONS. The presumption of jurisdiction from the recital in a tax foreclosure judgment of due service of summons is not overcome by defects in the record.

Appeal from an order of the superior court for King county, Griffin, J., entered November 24, 1906, refusing to vacate a judgment in a tax foreclosure proceeding. *Affirmed*.

Fred C. Brown, for appellants.

Byers & Byers, for respondent.

PER CURIAM.—This is an appeal from an order of the superior court of King county, refusing to set aside and purge its records of a purported judgment, and the subsequent proceedings had thereunder, in a delinquent tax proceeding foreclosing a lien of delinquent taxes on certain real property in King county. The petition to vacate the judgment sets forth the fact that the summons which was issued in the tax foreclosure case was in the following language: "You are hereby summoned and directed to appear within sixty days after the service of this notice and summons upon you, exclusive of the date of service in the above-named court, and defend the action," etc.; while it is contended that the law provides that the defendant shall be summoned to appear within sixty days after the date of the first publication of summons, exclusive of the day of the first date of publication and defend, etc.; and it was upon this alleged defect of the summons that the application to vacate is based.

Many cases are cited from this court to sustain the announcement that a summons of the character set forth in

¹Reported in 90 Pac. 597

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Statement of Case.

this petition is void; but in this case the recital in the judgment is to the effect that it appears to the court that service of notice and summons herein has been made upon the defendant herein according to the law, and that the legal time for answering has expired and no appearance has been made on behalf of said defendant, and that said defendant is in default and adjudged to be in default. It is the established law in this state that when the judgment recites that due service of process was made, the presumption of jurisdiction is not overcome by any defects in the record. *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463, and cases cited; *Peterson v. Lara*, ante p. 448, 90 Pac. 596.

No error having been committed by the court in denying the petition, the judgment is affirmed.

[No. 6730. Decided June 20, 1907.]

**DOMONIKI AMBROSE, *Appellant*, v. AUGUSTA AMBROSE MOORE
et al., *Respondents*.¹**

CANCELLATION OF INSTRUMENTS—COMPLAINT—SUFFICIENCY. A complaint alleging joint ownership and right of possession to real property, an adverse holding by certain defendants under a deed that is void for want of delivery, a refusal of the co-owner to join in the action, who is accordingly made a defendant, states a cause of action for cancellation of the deed and recovery of the property.

DIVORCE—DISPOSITION OF PROPERTY—COMMUNITY PROPERTY. A decree can make no disposition of the property of the spouses where it is not brought before the court, and failure to do so renders community property the common property of the divorced parties, and waives the right to which the parties might be entitled on considering the merits in the divorce action.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 7, 1906, upon sustaining a demurrer to the complaint, dismissing an action

¹Reported in 90 Pac. 588.

to decree an interest in real property and for the cancellation of a deed. Reversed.

Hathaway & Alston, for appellant.

E. N. Livermore, for respondents.

RUDKIN, J.—The complaint in this action alleges that the plaintiff, Domoniki Ambrose, and the defendant Augusta Ambrose Moore were husband and wife, on and prior to the 15th day of October, 1904, and were the owners and entitled to the possession of the premises now in controversy; that on the above date said defendant induced the plaintiff to execute a deed of said premises to the defendant Mary Ambrose; that it was then and there agreed that said deed should not be delivered to the grantee therein named, but should be placed in escrow in the possession of one Corwin L. Marsh, with instructions not to deliver the same to the grantee or to any person other than the plaintiff herein; that on the 28th day of March, 1905, the defendant Augusta Ambrose Moore obtained a decree of divorce from the plaintiff, but the property now in controversy was not mentioned in the divorce proceedings, and the plaintiff made no appearance in that action; that on the 9th day of February, 1905, said Corwin L. Marsh, without the knowledge or consent of the plaintiff and against his express instructions, delivered said deed to Mary Ambrose, the grantee therein named, and the same has been filed for record; that the plaintiff never authorized or consented to the delivery of said deed, never ratified such delivery and received no consideration therefor; that the plaintiff has demanded a reconveyance of the property which demand has been refused; that the defendant Augusta Ambrose Moore has refused to become a coplaintiff in the action and is made a party defendant; that the defendant George Moore is the husband of the defendant Augusta Ambrose Moore, and that the remaining defendants have or claim some interest in the property. The prayer of the complaint is that the plaintiff be decreed to be the

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owner of an undivided one-half interest in the property; that the deed to the defendant Mary Ambrose be cancelled and held for naught; that the plaintiff be let into possession of the premises, and for such other and further relief as to the court seem just and equitable in the premises.

The defendants demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff refusing to plead further, a judgment of dismissal was entered, from which the present appeal is prosecuted.

The complaint avers ownership in the appellant and the respondent Augusta Ambrose Moore, their right of possession, an adverse holding by the remaining respondents, under a deed which is void for want of delivery, and a refusal of the co-owner to join in the action. Such a complaint clearly states a cause of action, unless the allegation that the appellant and the respondent Augusta Ambrose Moore were divorced, without any adjudication or disposition of their property rights, defeats a recovery.

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children. . . ." Bal. Code, § 5723 (P. C. § 4637).

But this can only be done where the property is brought before the divorce court by complaint, answer, or cross-complaint. If the property rights of the parties are not thus brought before the court in some appropriate manner, such rights are not, and cannot, be affected by the decree. *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358. Where no disposition of the property rights of the parties is made by the divorce court, the separate property of the husband prior to the divorce becomes his individual property after divorce, the

separate property of the wife becomes her individual property, and from the necessities of the case, their joint or community property must become common property. After the divorce there is no community, and in the nature of things there can be no community property. The divorce does not vest or divest title, the title does not remain in abeyance, and it must vest in the former owners of the property as tenants in common. *Godey v. Godey*, 39 Cal. 157; *Biggi v. Biggi*, 98 Cal. 35, 32 Pac. 803, 35 Am. St. 141. In the latter case the court said:

"The conveyance of the land to the husband and wife made it presumptively community property, and their subsequent divorce without any disposition of that property in the decree left them tenants in common."

So far as the equitable rights of the parties are concerned, it can make no difference whether the property was originally conveyed to the husband, to the wife, or to both husband and wife. The respondents contend, however, that the appellant has only such interest in the property as the divorce court might have awarded to him, considering the merits of the parties, etc. If we were to concede this, perhaps he has still a valid subsisting interest in the property which would entitle him to maintain this action under Bal. Code, § 5500 (P. C. § 1142). But the respondents' contention cannot be upheld. If it were, neither the husband or wife would have any fixed or tangible interest in either separate or community property after a divorce in which property rights were not adjudicated, for all property, whether separate or community, may be disposed of by the divorce court. In our opinion when a person prosecutes a suit for divorce and fails to bring the property rights of the parties before the court for adjudication, he or she waives any right in or to the property of the other spouse; and when a defendant submits to a divorce under like circumstances the same rule will apply. The power to dispose of the property of the husband and wife is a mere incident of the power to grant the divorce, and ordinarily

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that power cannot be exercised by another court at another time or in an independent action. Public policy and the policy of the law will be best subserved by confining the inquiry into the merits of the divorced parties to the divorce court. There may be exceptions to this rule, in case of fraud, or where the property is without the jurisdiction of the court, but the general rule is as we have stated, and this case forms no exception to that rule. While the complaint does not allege in direct terms that the property was the community property of the appellant, and the respondent his former wife, all parties assume in their briefs that such was the fact. If so, it follows from what we have said that the complaint shows that the appellant is the owner of an undivided one-half interest in the property, and otherwise states a cause of action. *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, ROOT, and MOUNT, JJ., concur.

[No. 6738. Decided June 20, 1907.]

GEORGE W. MILAM, *Respondent*, v. GEORGE A. MILAM,
Appellant.¹

ASSAULT—CIVIL LIABILITY—ACTIONS—DAMAGES. A judgment for \$250, for damages received in a fight which either of the parties could have avoided, is proper, where the plaintiff's biting of the defendant was unjustifiable, and entailed a loss of \$50 for medical attendance and three months loss of time, worth \$50 per month.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered January 16, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

Zent & Lovell, for appellant.

Lucius G. Nash, for respondent.

Root, J.—Respondent brought this action to recover damages against appellant for injuries sustained in a personal encounter with the latter. From a judgment for \$250 in favor of plaintiff, this appeal is taken.

The facts were about these: Respondent visited appellant's farm relative to some business matter, and was told by the latter to go away as he wanted nothing more to do with him, charging him with having sworn falsely in a recent lawsuit. After calling each other certain vile names, appellant told respondent to get off his horse, which he was then riding, and he—appellant—would "give him what he needed." Respondent dismounted from his horse and, in a few moments, they were engaged in a fight. In their struggle they fell to the ground, and appellant in some manner seized a portion of respondent's hand in his mouth, biting off a knuckle and breaking the bones of one finger. They were soon separated by a neighbor who appeared upon the scene. Respondent

¹Reported in 90 Pac. 595.

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Syllabus.

claims that appellant's wife and mother assisted his opponent in the contest, and the mother was made a party defendant. The action as to her, however, was dismissed by the trial judge. The case was tried before the judge without a jury, the latter having been waived by the parties. The evidence showed that appellant paid \$50 for medical services on account of his injuries, and lost three months' time, being capable, but for the injuries, of earning \$50 a month. The trial court found that the biting of respondent by appellant was unjustifiable and that, under all the circumstances, judgment should go for plaintiff in the sum above mentioned. We think the trial judge's disposition of the case was substantially right. Either of these parties could readily have avoided this difficulty. In the conflict each received some beating, but the biting of respondent was cruel and unjustifiable. The trial court allowed him a little more than his actual expenses and the value of lost time. We see no reason for disturbing the judgment. It is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 6360. Decided June 20, 1907.]

MARY HESTER, *Respondent*, v. O. M. STINE, *Appellant*.¹

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—RENTS AND PROFITS—DEBTS OF HUSBAND. Barley raised upon the real estate purchased by a wife with her separate funds, is her separate property, where she conducted the farming of the land in her own name and in her separate interest without any assistance from her husband, who was away most of the time and largely indebted at the time of his marriage.

SAME—ACTIONS—RIGHT OF WIFE TO SUE—REPLEVIN—COMPLAINT—SUFFICIENCY—AFFIRMATIVE DEFENSE—REPLY. In an action of replevin by a married woman under statutes authorizing her to acquire, hold and sue for property as if she were unmarried, a com-

¹Reported in 90 Pac. 594.

plaint alleging that she was the owner and entitled to the possession of the property is sufficient without deraigning her title; and an answer that she was a married woman and that the "property had been acquired since the marriage" states no affirmative defense, and requires no reply from her showing that she acquired the property as separate property.

APPEAL—REVIEW—HARMLESS ERROR—AMENDMENTS TO CONFORM TO PROOF. If a complaint in replevin is faulty in not deraigning the plaintiff's title, and the court refuses a request for an amendment to cure the defect on the ground that the amendment is essential, the defendant cannot be misled, and the supreme court will on appeal consider the amendment made to conform to the proof.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered March 29, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

R. F. & R. M. Sturdevant, for appellant.

Will H. Fouts, for respondent.

DUNBAR, J.—Action in replevin for the recovery of personal property. The suit was brought by respondent, Mary Hester, for the recovery of the possession of several hundred sacks of barley, or for the value thereof in case recovery could not be had. The respondent was a married woman, but the complaint was in the ordinary form, not disclosing the fact that she was a married woman, but alleging ownership and right of possession, demand, and refusal. The answer of the sheriff, appellant here, set up the fact that the property was taken under execution; also alleging that the plaintiff was the wife of one R. M. Hester, and that they had been living together in the community for a period of about ten years; and alleged the other ordinary facts in defense of an officer's right to take the property under execution. There was no reply to the answer, and motion was made by the defendant for a judgment on the pleadings, for the reason that the answer affirmatively set forth a full and complete defense to

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the cause of action, and that there had been no reply filed thereto. This motion was overruled, the cause proceeded to trial, and the court found, among other things, that the plaintiff was a married woman; that at the time of her marriage she was possessed of separate property to the amount of \$2,200 in money, and twenty-five head of horses, and some promissory notes, and that at the time of her marriage her husband, Robert M. Hester, had no property and was largely in debt; that the plaintiff afterwards purchased the land upon which the barley was raised, and said land was paid for by the plaintiff out of her separate means and property; that the said barley was raised on said real estate, and was the rents, issues and profits thereof during the year 1903; that the indebtedness and judgment upon which the execution issued under which the barley was levied upon was the separate debt of the husband R. M. Hester, contracted prior to his marriage with the plaintiff, and that the barley at the time of the commencement of the action was of the value of \$656.71. From such facts the court announced its conclusions of law, to the effect that the said real estate and the said barley raised thereon were the separate property of the plaintiff Mary Hester; that she was entitled to a judgment for the return of the barley described in her complaint, and in case delivery could not be had, to a judgment for the sum of \$656.71, the value thereof, with legal interest and costs. The plaintiff excepted specially to all the findings of fact made by the court, and to the conclusions of law.

It is plain from the testimony in this case that there was no commingling of separate and community property, which would bring it within the rule announced in *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398. Unquestionably the respondent purchased the land upon which the barley was raised with her own separate money, earned by teaching school, clerking in stores, and working upon a farm, prior to her marriage. She conducted the farming of the land in her own name and in her own separate interest, and without any

assistance from her husband, who was most of the time absent from the state. The barley was deposited in her own name, and was in reality her separate property. The facts found by the court are so plainly established by the proofs that we do not deem a special review or analysis of the testimony necessary. Conceding the correctness of appellant's contention that where the property is acquired after marriage the burden of proof is upon the one alleging its separate character, we think the proof in this case is ample to sustain such burden.

But it is contended by the appellant that the court should have sustained his motion for judgment on the pleadings, for the reason that the complaint did not contain any allegation of coverture or separate interest in the property in litigation, and that the answer of the sheriff showed a justification for the taking, and alleged that the respondent was the wife of one R. M. Hester, that they had been living together in the relation of husband and wife for about ten years, and that the property seized by him had been acquired by the said R. M. Hester and respondent since their marriage. The appellant is mistaken as to the allegation of the answer in this respect. The record shows that the allegation is, not that the property had been acquired by the said R. M. Hester and respondent since their marriage, but "that the said personal property had been acquired since the marriage of plaintiff and said R. M. Hester," and, of course, it is true that the particular property, to wit, the barley, had been acquired since that time. But the respondent alleged that she was the owner of it and was entitled to its possession, and the allegation of the answer, that the respondent was a married woman—which allegation was not denied—could not, under our laws, work a deprivation of respondent's right to sue for her own property. Bal. Code, § 4502 (P. C. § 3863), provides that every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried. In this case the respondent, in conformity

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with this law, sued as if she were unmarried. Section 4504 (P. C. § 3873), provides that contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried; and § 4505 (P. C. § 3868), goes to the extent of authorizing a husband and wife to sue each other.

In the light of these provisions, it seems certain that the wife in this instance had the undoubted right to sue for the recovery of her property. Nor was she compelled, under the broad provisions of the law, to plead more specifically than she did. A case which cannot be distinguished in principle from the one under consideration is *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732. There, as here, the action was by a married woman to recover the possession of personal property, and the defendant justified his taking by answering that he was a constable and had served a lawful writ of attachment upon the property; also alleging, as the officer does in this case, that one of the plaintiffs was a married woman. Upon this state of facts appearing, the court rendered judgment for the defendant, on the ground that, since one of the alleged partners was a married woman, there was shown by the pleadings a want of legal capacity to sue in the plaintiff, for the reason that it was not pleaded that the wife acquired her interest in the alleged partnership property through one of the channels through which the statutes of this state provide that a married woman may have separate property. The judgment of the court was reversed, for the reason that, under the liberal provisions of our statutes concerning the right of married women to do business for themselves, they should not be required to deraign their title when they sued for the possession of property and alleged ownership.

But even if the complaint could be held to be faulty in this particular, when the question was raised the plaintiff asked leave to amend her complaint, setting up ownership of the property in her own separate right. This request was refused,

the trial court deeming the complaint sufficient. So that the appellant was not misled as to the true issues presented, and under such circumstances, this court, if it deemed it were necessary, would consider the complaint amended to correspond with the proof.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

[No. 6685. Decided June 22, 1907.]

THE STATE OF WASHINGTON, *on the Relation of R. W. Barto,*
Respondent, v. BOARD OF DRAINAGE COMMISSIONERS
OF DISTRICT NO. 1 OF PACIFIC COUNTY,
*Appellant.*¹

MANDAMUS—TO OFFICERS—REMEDY AT LAW—COMPELLING ISSUANCE OF WARRANTS—DRAINS. Mandamus is the proper remedy to secure the issuance by drainage commissioners of warrants in payment of services, although the right thereto is denied and plaintiff might proceed by ordinary action for breach of contract; since, under the Code, mandamus is but a form of civil action wherein appropriate relief may be given, and is specially authorized by Bal. Code, § 5755 to compel the performance of duty imposed by law upon public officers, and by Laws 1895, ch. 115, § 40, providing that the superior courts may by mandatory injunction compel the performance of the duties imposed by the drainage act.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered August 25, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits in an action for a mandamus to compel the issuance of warrants by the commissioners of a drainage district. Affirmed.

¹Reported in 90 Pac. 660.

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Hewen & O'Phelan (*Charles E. Miller*, of counsel), for appellant.

Blaine, Tucker & Hyland and *Welsh & Welsh*, for respondent.

DUNBAR, J.—The appellant is a drainage district incorporated under the drainage statutes of the state. The commissioners of this district entered into a contract with the respondent's assignor to dig a ditch or drain in their district. The contract is set forth in the pleadings and the briefs of respective counsel, but it is not necessary to produce it here. Upon the alleged completion of the contract and the refusal by the commissioners to pay the amount claimed by David Swank, the respondent's assignor, the respondent made application for a writ of mandamus against the board, to compel them to issue warrants in payment of services alleged to have been rendered. Motion was made to quash the writ, which was overruled; the appellant answered, the case was tried to a jury, verdict was rendered in favor of the respondent in the sum of \$3,052, new trial was denied, and appeal was taken.

The main contention in this case, and really the only one discussed, is that the motion to quash should have been sustained for the reason that the remedy of mandamus was not the proper remedy in the case, it being the contention of appellant that, inasmuch as the allegations of the complaint in regard to the performance of the services were denied, the respondent's remedy was an action for breach of contract, for which the plaintiff had ample remedy by an ordinary action. It is useless to discuss the office of the ancient writ of mandamus. It is a matter of common knowledge with lawyers that it was a writ prerogative of the king and issued only at his pleasure. It was an attribute of sovereignty, and a citizen could not, as a right, invoke its aid. But even at the common law its scope became enlarged, and it could be invoked by the private citizen to compel the performance of a legal duty

on the part of the courts and other tribunals. But it is not the common law writ that is under discussion in this case, and all citation of authority defining the ancient writ may be brushed aside as inapplicable under the provisions of the code; for the code prescribes its use and makes it simply one of the methods of procedure for the enforcement of rights or the redress of wrongs. This court has in several cases, notably *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264, and *Brown v. Baldwin*, ante p. 106, 89 Pac. 483, adversely criticized the practice which encourages quibbling over mere forms of procedure, to the delay of substantial justice and in opposition to both the spirit and letter of the code, which provides that there shall be but one form of civil action, and abolishes in effect the many distinctions indulged in by the common law in relation to the forms of actions.

But, outside of these general considerations, and conceding for the purpose of this discussion the contention of appellant that mandamus will not lie for a breach of a private contract or the enforcement of private contractual rights, this plainly is not an action in aid of the enforcement of private contractual rights, but is an attempt to compel statutory officers to perform statutory duties imposed by law upon the person or body against whom the coercive power of the court is invoked. Section 6, chapter 115, of the Session Laws of 1895, provides for the election of the drainage commissioners. Section 8 confers upon such commissioners exclusive charge of the construction and maintenance of all drainage systems which may be constructed within the boundaries of their district, and constitutes them the executive officers thereof. Section 25 makes it their duty to issue warrants in payment of all claims of indebtedness against the district. So that it could scarcely be said that the application for the writ, to compel the commissioners to issue warrants in payment of claims against the district for the construction of a ditch contracted for by the commissioners under the direct provisions of the law, was in any sense an application for the en-

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forcement of a private contract. On the other hand, it as plainly falls within the provisions of Bal. Code, § 5755 (P. C. § 1407), to the effect that mandamus may be issued by a court, except a justice court, to any inferior tribunal, body, or person, to compel the performance of any act which the law especially enjoins as a duty resulting from the office, trust, or station. In addition to this, the drainage act itself, § 40, provides that the superior court may compel the performance of duties imposed by this act, and may in its discretion, on proper application therefor, issue its mandatory injunction for such purpose. The allegations in the petition and affidavit for the writ must be accepted by this court as true, for the reason that no statement of facts has been made or settled, and the verdict of the jury establishes the truth of the allegations; and the allegations are to the effect that the board refused to perform a duty imposed by statute.

This question was before the court in the case of *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, and mandamus there, under the provisions of the code, was defined to be a judicial investigation, the object of which was the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment. A case parallel in all respects with the case at bar is *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207. This was an action brought by a school teacher against the officers of a school district to compel them to issue warrants for a teacher's salary. There, as here, issues of fact were joined, the board of directors alleging that the teacher had not performed the conditions of his contract of hire. A motion was made to quash the writ, which was sustained by the trial court on the ground that mandamus was not the proper remedy. This court, however, upon appeal, reversed the judgment, and held that an action at law against the district would not furnish him relief; that the most he could obtain by such an action would be a judgment against the district which would entitle

him to a warrant drawn by the directors upon the county treasurer; that he could not obtain in an action at law a judgment which could be collected by execution, and he would therefore have to resort to mandamus to secure his rights, if the directors still refused to act of their own volition; that there was no reason why he could not resort to the remedy by mandamus in the first instance in order to make his judgment effective. It was held that it was a procedure under the code, and that any person who had a cause that called for its invocation had the same right to sue out the writ as he had to commence a civil action to redress a private wrong; and that the procedure had in it all the elements of a civil action. That is an exhaustive case; the authorities are collated and analyzed, and every question which is raised in this case is therein decided.

Believing that, under the provisions of the statute and the decisions of this court, the writ was properly issued, the judgment is affirmed.

HADLEY, C. J., MOUNT, ROOT, FULLERTON, and CROW, JJ., concur.

[No. 6717. Decided June 22, 1907.]

BERNHART BRANT BARTELS, *a Minor, by His Guardian Ad Litem, F. W. Burdick, Respondent*, v. LOUIS P. CHRISTENSEN *et al.*, *Appellants*.¹

JUDGMENT — PROCESS — TAXATION — FORECLOSURE OF TAX LIEN — FORM OF SUMMONS. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default; and Laws 1899, ch. 141, does not change the law in regard to the requirements of the summons.

¹Reported in 90 Pac. 658.

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Opinion Per Curiam.

Appeal from a judgment of the superior court for King county, Steiner, J., entered March 14, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to vacate a judgment foreclosing a tax lien. Affirmed.

E. P. Edsen and John E. Humphries, for appellants.

Wilson & Thorgrimson, for respondent.

PER CURIAM.—This is an action by the respondent to vacate and set aside a judgment obtained on a tax foreclosure proceeding. The judgment was vacated and the appeal followed. It is stipulated by the parties to this action that there is but one question in the case, and that is as to the sufficiency of the form of the notice or summons published, which notice or summons is set forth in appellants' brief. The essential part of the notice to consider is as follows:

"You and each of you are hereby directed and summoned to appear within sixty days after the service of this notice and summons upon you, exclusive of the day of service, in the above entitled court, and defend the action or pay the amount due, together with costs."

It is also stipulated that, if the summons in the original case is in substance and in form as required by statute, the court shall reverse the case and enter judgment for the appellants. If, however, the summons is not in form and substance as required by statute in force at the time, the court shall affirm the judgment.

The identical question presented in this case has twice before been decided by this court against appellants' contention, in the cases of *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, where it was held that a summons which directed the defendant to appear within sixty days after the service of the summons upon him, exclusive of the day of service, and defend the action, etc., would not confer jurisdiction upon the court to render judgment. The reasons are stated at length in the

cases above referred to, and it is not necessary to restate them here.

It is contended, however, by the appellants that the amendatory act, found in the session Laws of 1899, chapter 141, could not have been called to the attention of the court in the foregoing cases, and that such amendment changes the law in regard to the requirements of the summons. It may be true that such amendment was not called to the attention of the court in the cases referred to, for the reasons that it appears that it in no way affects the question decided in those cases and did not attempt to change § 97 of the Laws of 1897, page 182, ch. 71, which section provides that summons shall be served in the same manner as summons in a civil action is served in the superior court. And in the cases above referred to decided by this court, reference was made to this section and to the provision of the general law in relation to the manner of publication and forms of summons, viz., Bal. Code, § 4878 (P. C. § 336), which provides that the summons shall contain the date of the first publication, and shall require the defendant or defendants, upon whom service of publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons.

The judgment is affirmed.

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Opinion Per Root, J.

[No. 6340. Decided June 22, 1907.]

ED. ANDREWS, *Respondent*, v. SAN JUAN FISH COMPANY,
Appellant.¹

SHIPPING—CHARTERS—SEAWORTHINESS—NOTICE—CONSTRUCTION OF AGREEMENT. Where, during five or six days immediately preceding the making of a charter agreement for a small steamer for the period of one year, the officers of the lessee took three or four trips on the boat while operated by the owner, and no fraud was practiced and the lessee had full opportunity to know the condition of the boat, the lessee cannot, after several weeks use, avoid payment of the rent on the plea that the steamer was unseaworthy when chartered, the agreement having expressly provided that the lessee should make all necessary repairs at its own expense and keep the vessel in first-class condition during the term.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 18, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

McClure & McClure, for appellant.

Langley & Hamlin (*Sauter & Sheldon*, of counsel), for respondent.

Root, J.—Respondent was the owner of a small steamer which, upon the 6th day of August, 1904, he chartered to appellant, the charter agreement containing the following provisions:

“For the use of said steamer, said San Juan Fish Company agrees and binds itself to pay to said Ed. Andrews, the sum of four hundred fifty and no-100 (\$450.00) dollars, the payments to be made as follows: \$75.00 on the first day of August, 1904; \$75.00 on the 15th day of August, 1904; \$75.00 on the 1st day of September, 1904; \$75.00 on the 1st day of October, 1904; \$75.00 on the 15th day of October, 1904. It is further understood and agreed that said second party shall

¹Reported in 90 Pac. 643.

[No. 6724. Decided June 22, 1907.]

LEWIS W. CHASE, *Respondent*, v. RUDOLPH KNABEL,
Appellant.¹

CONSTITUTIONAL LAW—DEPRIVATION OF CIVIL RIGHTS—ACTIONS—EVIDENCE—SUFFICIENCY. In an action by a negro, ejected from a restaurant, the evidence does not sustain a cause of action for refusal of equality of civil rights, where the plaintiff in his testimony did not claim that the ejection was in any way due to his color and had theretofore always been properly served there (FULLERTON, J. dissenting).

MASTER AND SERVANT—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—INNKEEPERS—PATRONS—PROTECTION AND EJECTION. Waiters, in ejecting a negro from a restaurant for an alleged insult to a lady patron, are acting within the scope of their employment if the same was done for the purpose of according protection to such patron, and the owner of the restaurant is liable for damages occasioned by unnecessary force and violence; but if the waiters were actuated by jealousy, hatred, or ill-feeling independent of their duty toward the lady patron, they acted outside of their employment, and their master was not liable for their acts.

Appeal from a judgment of the superior court for Pierce county, Irwin, J., entered January 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for an assault and battery committed by defendant's servants. Reversed.

S. F. McAnally and *Charles L. Westcott*, for appellant, cited: *Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 100 Am. St. 154, 65 L. R. A. 88; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 South. 631, 8 Am. St. 512.

Lawrence Sledge, for respondent, contended, among other things, that one in defendant's business is liable for an assault and battery committed by his waiters. *Bryant v. Rick*, 106 Mass. 180, 8 Am. Rep. 311; *Morris Hotel Co. v. Henley*, 145 Ala. 678, 40 South. 52; *Goodwin v. Greenwood*, 16 Okl.

¹Reported in 90 Pac. 642.

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489, 85 Pac. 1115. This, solely upon the doctrine of respondeat superior. *Warax v. Cincinnati etc. R. Co.*, 72 Fed. 637; *Priest v. Hudson River R. Co.*, 40 How. Prac. 456; *Daily v. Redfern*, 1 Mont. 467; *Ously v. Hardin*, 23 Ill. 403. And even though the battery was wanton and malicious. *Schmidt v. Vanderveer*, 110 App. Div. 758, 97 N. Y. Supp. 441, *Geraty v. Stern*, 30 Hun. 426; 2 Am. & Eng. Ency. Law (2d ed.), 990; *Cohen v. Dry Dock etc. R. Co.*, 69 N. Y. 170. Even if disapproved by the master. *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Turner v. North Beach etc. R. Co.*, 34 Cal. 594; *Church v. Mansfield*, 20 Conn. 284; *Noble v. Cunningham*, 74 Ill. 51; *Lutz v. Forbes*, 13 La. Ann. 609; *Stickney v. Munroe*, 44 Me. 195; *Cleveland v. Newsom*, 45 Mich. 62. Where the principal has placed his agent in a position of trust, he should suffer from the agent's wrongful acts, rather than another innocent person. *Hern v. Nichols*, 1 Salk. (Eng.) 289; *Lee v. Sandy Hill*, 40 N. Y. 442; *Locke v. Sterns*, 1 Met. (Mass.) 560, 35 Am. Dec. 382; *Higgins v. Watervliet T. Co.*, 46 N. Y. 23, 7 Am. Rep. 293. The plaintiff was denied equality of civil rights. *Fruchey v. Eagleson*, 15 Ind. App. 88; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Baylies v. Curry*, 128 Ill. 287, 21 N. E. 595; *Ferguson v. Gies*, 82 Mich. 358, 46 N. W. 718, 21 Am. St. 576, 9 L. R. A. 589.

Root, J.—Respondent, who is a colored man, although the complaint does not allege the fact, brought this action against appellant, who was the owner and manager of a restaurant in Tacoma, and two waiters employed by appellant in the restaurant. The complaint set forth two causes of action; the first, based upon an assault and battery committed by these waiters in improperly ejecting plaintiff from the restaurant; the second, for alleged refusal of equality of civil rights. The trial resulted in a verdict for plaintiff in the sum of \$400, for which amount judgment was entered against each and all of the defendants, after the denial of a motion for a new trial.

From the judgment as against appellant, this appeal is prosecuted.

It is strenuously urged by appellant that there is no evidence to sustain the second cause of action; that the plaintiff's color had nothing to do with his being ejected from the restaurant. The evidence does not support this cause of action. Plaintiff himself in his testimony made no claim that the occurrence was in any way occasioned by reason of his color, and testified that he had always been served and treated properly theretofore in appellant's restaurant.

It is also contended that the action of the waiters in assaulting and ejecting plaintiff was not within the scope of their employment. The facts shown by the evidence were about these: Plaintiff had been eating from time to time in this restaurant during a period extending over more than fourteen years. On the evening in question, he entered the restaurant and gave his order to one of the waiters, who started for the kitchen apparently with the intention of bringing his dinner. After the waiter went out, plaintiff stepped to the street door, and upon returning, saw a lady sitting in that part of the restaurant which is ordinarily occupied by women patrons. This lady was employed in an establishment where the plaintiff sometimes worked, and he had frequently there seen her and spoken to her, and she to him, with reference to the work he was doing. He approached the table where she was sitting reading a newspaper, and spoke to her, receiving no response. Thinking she did not hear him, as he says, he again addressed to her a remark of a jocular character. She looked up in an apparently embarrassed manner and nodded, and at this moment the waiter, having returned with plaintiff's dinner, came over, shook him, and told him that that was no place for him and to come out of there and eat his dinner, and plaintiff says that the waiter told him not to be insulting the lady. Plaintiff remarked that he was acquainted with the lady. The waiter responded in substance that he did not care if he was; for him to immediately come out of there and eat

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his dinner, and proceeded to push him along toward the table, in which direction the plaintiff proceeded to go, protesting, however, that he had not insulted the lady and that he was acquainted with her. In his excitement he passed by the table, and then turned around, and the waiter told him to sit down or else get out of there, and the next moment placed plaintiff's hat upon his head and took him by the arm and started him toward the door, and another waiter seized the other arm and assisted in the movement. Plaintiff says that, just as he went out of the door, one of them—he did not know which—struck him a vicious blow on the side of the head with something, he did not know what, and knocked him to the sidewalk, where he remained for a few moments in a half-dazed condition. Two of appellant's witnesses, however, say that plaintiff was pushed out because he was annoying the lady customer, and when requested to desist and eat his dinner, became boisterous and proceeded to swear and use loud language and create a disturbance; that after being put out, he started to return, in a belligerent manner, when one of the waiters struck him. Plaintiff then started for his home, and claims that while on the way home and that evening he was at times overcome with spells of semiunconsciousness from the effects of the blow received. He was around the next day, however, and does not appear to have had any scars or other outward evidences of the injury received. The proprietor of the restaurant was not present at the time of this occurrence, and knew nothing of it until months afterwards. Plaintiff being asked upon the witness stand as to why the waiter shook him and insisted on his coming away from the presence of the lady, answered that he thought the waiter was jealous of him, although upon cross-examination he could give no satisfactory reasons for this opinion.

The question for the jury to decide, under the first cause of action alleged, was as to whether this assault upon plaintiff was made by these waiters within the scope of their duty

as such, or whether it was by reason of a personal difficulty, ill will, or ill feelings existing between the plaintiff and the waiter or waiters themselves, independent of their functions as servants of appellant. It is doubtless the duty of a restaurant keeper to accord protection to lady patrons from insult or annoyances while they are in his restaurant. If such a lady customer is insulted or annoyed, it is doubtless the duty of the proprietor or his waiters or servants to put a stop to such annoyance and, if necessary, to eject the person guilty of the offense; and in so doing they may use all necessary force, being liable, however, in damages for injuries occasioned by the use of unnecessary force and violence. On the other hand, if the assault and battery made upon plaintiff was occasioned by reason of ill will, jealousy, hatred, or other ill feeling on the part of the waiter or waiters, independent of their duty as agents of the proprietor toward the lady in question, then the proprietor would not be holden in damages. In this case the trial court, under proper instructions, submitted to the jury the question of whether or not these waiters were acting within the scope of their employment as agents of the proprietor, and as to whether or not they used undue force and violence in case they were acting in such capacity, and as to whether respondent was denied the rights guaranteed to him by the constitution and civil rights statutes. The jury, under these instructions, must have found that the waiters were acting within the scope of their employment as servants of appellant, and that they did not accord plaintiff the privileges guaranteed to him under the civil rights laws, or that they improperly assaulted and ejected him from the premises or used unnecessary force and violence in so doing.

As there is no evidence to sustain the second cause of action, it was error to submit any question concerning it to the jury. It is impossible to tell from the record whether the jury allowed damages under one or both causes of action. Hence the judgment must be reversed and the cause remanded for a

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Statement of Case.

new trial upon the matters alleged as to the first cause of action. It is so ordered.

HADLEY, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

FULLERTON, J. (dissenting)—As I read the record, there was evidence tending to support both causes of action, and I do not think, therefore, that the trial court erred in its submission of the cause to the jury. The judgment should be affirmed.

[No. 6817. Decided June 24, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Mary M. Miller, Plaintiff*, v. ARTHUR E. GRIFFIN, *Judge of the Superior Court for King County, Respondent*.¹

STATUTES—CONSTRUCTION. Two acts passed at the same session of the legislature relating to the same subject-matter must be construed together.

EMINENT DOMAIN—PARTIES ENTITLED—FOREIGN CORPORATIONS—RAILROADS TOUCHING STATE—STATUTES—CONSTRUCTION. LAWS 1889-90, p. 525, § 3, relating to the right of railroads whose lines touch the state, which provides that such a corporation complying with the act shall have all the rights and privileges to extend its lines into the state that it would have had if it had been authorized so to do by filing articles of incorporation, in accordance with the general laws of the state (Code, 1881, § 2478), recognizes the legal right of a foreign corporation to construct lines in the state, although it had no line touching the state; and a general law subsequently taking effect (Laws 1889-90, p. 288) completely covering the latter subject-matter, would likewise authorize foreign corporations to construct lines in the state, although not coming within the provisions of the special act relating to the extension of lines touching the state.

Application for a writ of certiorari to review a judgment of the superior court for King county, Griffin, J., entered June 11, 1907, in condemnation proceedings, adjudging a public use and directing a jury to assess the damages. Writ denied.

¹Reported in 90 Pac. 661.

Blaine, Tucker & Hyland, for relator.

Bogle, Hardin & Spooner, for respondent.

CROW, J.—This is an original application for a writ of review. The Oregon and Washington Railroad Company, a foreign corporation, organized and existing under the laws of the state of Oregon, with power to construct and equip a line of railroad from Portland, Oregon, to Everett, Washington, filed its petition in the superior court of King county, to condemn a right of way for a tunnel beneath the surface of certain real estate, in the city of Seattle, belonging to the relator, Mary M. Miller. The petition, which is in usual form, alleges that the corporation has filed in the office of the secretary of state of Washington a duly certified copy of its articles of incorporation; that it has appointed a resident agent upon whom service of process may be had, and that it has in all respects complied with the laws of Washington regulating foreign corporations doing business in this state. The superior court entered an order adjudging a public use and directing that a jury be impaneled to assess damages.

The relator, Mary M. Miller, in support of her application for a writ of review, contends that the superior court erred in entering the order of condemnation and adjudging a public use, for the reason that the Oregon and Washington Railroad Company has no railroad constructed in this state; that it has no constructed railroad reaching to or intersecting the borders of this state; that it has no railroad in existence at all, and that there is no warrant in law authorizing it to condemn property in this state. In support of this position the relator relies upon § 3 of chapter 17, page 525, Laws 1889-90, being § 4305, Bal. Code, and § 7803, Pierce's Code, and contends that chapter 9, page 288, Laws of 1889-90, being § 4291 *et seq.*, Bal. Code, and § 7214 *et seq.*, Pierce's Code, does not apply to foreign railroad corporations. While it is shown that the Oregon and Washington Railroad Company has expended millions of dollars in acquiring its right of way in this

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state, and is about to construct a line of road from Portland, Oregon, to Everett, Washington, it does not appear that it has any line of railroad now actually constructed either in the state of Oregon or the state of Washington. The relator contends that chapter 17, Laws of 1889-90, is a special act relating to foreign railroad corporations, prescribing the procedure under which they may enter this state and construct lines of road; that chapter 9, Laws of 1889-90, relating to foreign corporations doing business in this state, being a general act, does not apply to foreign railroad corporations, its provisions being controlled by the special act; in other words, that chapter 17, which the relator denominates a special act, provides the *only conditions* under which foreign railroad corporations may enter this state; that these provisions are exclusive, and that before the respondent is entitled to enter the state or exercise the right of eminent domain, it must first comply with the provisions of § 3 of chapter 17, by actually constructing its line to the borders of this state.

This contention cannot be sustained. Chapter 17, which expressed an emergency clause in its preamble, was received by the governor on March 28, 1890, the day on which the legislature adjourned *sine die*. It became a law without his approval, and under the emergency expressed in its preamble, took effect April 8, 1890. Chapter 9, Laws 1889-90, was approved by the governor, but having no emergency clause did not take effect until June 26, 1890. It thus appears that chapter 17 took effect some eighty days prior to chapter 9. These two acts passed at the same session of the legislature, and chapter 189 of the Code of 1881, hereinafter mentioned, all relate to the same subject-matter, are *in pari materia*, and must be construed together, so that, if possible, a proper and harmonious effect may be given to all of them during the respective periods of their being in force, although they contain no reference one to another, and were passed at different times. Lewis' Sutherland, Statutory Construction (2d ed.), § 443.

Section 3 of chapter 17, Laws of 1889-90, provides that, any railroad corporation chartered by or organized under the laws of the United States or of any state or territory, whose constructed railroad shall reach or intersect the boundary line of this state at any point, may extend its railroad into this state from any such point of intersection. It further provides that, before making any such extension, such corporation shall, by resolution entered in the records of its proceedings, designate the route of the proposed extension, the place from which it is to be constructed, its estimated length, the counties through which it will pass, and shall file a copy of such record, duly certified, in the office of the secretary of the state of Washington. These are the only preliminary acts required of a foreign railroad corporation, by § 3, as a condition precedent to the construction of an extension line in this state. Section 3 further provides that:

“Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch and receive such aid thereto as it would have had had it been authorized so to do by articles of incorporation duly filed in accordance with the laws of this state.”

This last clause indicates a recognition by the legislature of the legal right of a foreign railroad corporation to then enter this state, construct its line of road and transact business under some other existing law, by filing its articles of incorporation. Chapter 189, Code of 1881, § 2478 *et seq.* relating to foreign corporations, was then in full force and effect. Under this chapter any foreign corporation (which included a railroad corporation) had authority to enter this state and do business upon compliance with its provisions. This chapter remained in force concurrently with chapter 17 of the Laws of 1889-90, until June 26, 1890, when chapter 9 of the Laws of 1889-90 took effect. Chapter 189 of the Code of 1881 having remained in effect for that period, chapter 17 must, if possible, be construed in harmony therewith, as well as with said chapter 9 after it took effect. We

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conclude that, by enacting said chapter 17, the legislature intended to permit a foreign railroad corporation, having a constructed line of railroad reaching to and intersecting the borders of this state, to enter this state and do business on the terms therein named, and without compliance with chapter 189, Code of 1881, then in effect, relating to foreign corporations; but that it did not deprive any such foreign corporation of its right to enter this state to construct a line of road, and transact business, upon full compliance with chapter 189, Code of 1881, and to do so without having any constructed line of road reaching to or intersecting the borders of this state. It is true that this construction of chapter 17, Laws 1889-90, which we see no way to avoid, may be such as to cause its validity to become questionable under § 7, art. 12, of the state constitution. However, that question is not now before us, and will not be passed upon. When chapter 9, Laws 1889-90, went into effect, it completely covered the subject-matter of chapter 189 of the Code of 1881, and we are of the opinion that, under said chapter 9, a foreign railroad corporation is entitled to come into this state upon full compliance therewith, build its lines of road, transact business, and exercise the right of eminent domain, without regard to any line of road theretofore constructed.

The application for writ of review is denied.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 6699. Decided June 26, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. LOUIS EDDY,
Appellant.¹

LARCENY — INFORMATION — OWNERSHIP — STATUTORY PROVISIONS—
VARIANCE. Under Bal. Code, § 6861, providing that, upon prosecutions for horse-stealing where the ownership is unknown, the property shall be deemed to be owned by the state of Washington, and that proof of the actual owner shall not be deemed a variance where the information alleges the state to be the owner, it is not necessary to allege that the ownership is unknown in an information charging that the horse was the property of the state of Washington.

SAME. In such a case, the state cannot be held to have known the actual ownership because its witnesses testified that the animal bore the brand of and was owned by S., where defendant denied such fact and claimed the animal to be without brand and an "outlaw."

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered November 26, 1906, upon a trial and conviction of the crime of horse-stealing. Affirmed.

Sturdevant & Bailey, for appellant.

George H. Rummens, for respondent.

HADLEY, C. J.—The appellant was charged, tried, and convicted under an information, the essential part of which is as follows:

"Comes now Geo. H. Rummens, the duly elected, qualified and acting prosecuting attorney for the county of Asotin, the state of Washington, and by this information complains of and accuses the above-named defendant, the said Louis Eddy, of the crime of horse-stealing, committed as follows, to wit: That he, the said Louis Eddy, in the county of Asotin, the state of Washington, on or about the first day of August, A. D. 1906, then and there being, did then and there unlawfully and feloniously take, steal, and drive away one gelding of the property of the state of Washington, of value." It will be observed that the stolen property is described as the property of the state of Washington. At the trial certain

¹Reported in 90 Pac. 641.

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Opinion Per HADLEY, C. J.

witnesses introduced by the state gave testimony which tended to show ownership in one Schulke. Objection was made to the admission of this testimony, it being contended that it was not in support of the allegations of the information upon that subject. The objection was overruled. The court was also requested to instruct the jury that, before they could convict the defendant, they should find from the evidence beyond a reasonable doubt that the ownership of the horse was in the state of Washington at the time it was taken by the appellant, and that if they should not so find, they should return a verdict of not guilty. The instruction was refused. These rulings of the court are now assigned as error.

The information, so far as the matter of ownership is concerned, was drawn with reference to § 6861 of Bal. Code, (P. C. § 2114), which is as follows:

"In prosecutions under the provisions of sections 7113, 7125, 7127, where the owner of the property is unknown, such property shall, for the purpose of this code, be deemed and held to be owned by the state of Washington; and in all cases where the indictment or information alleges the state to be the owner of such property, and the proof on the trial discloses the name of the actual owner, it shall not be deemed a variance, or failure of proof, unless the defendant is the actual owner."

Appellant contends that the state should have alleged that the ownership was unknown. The statute does not require such an allegation, the existence of the fact of unknown ownership being sufficient to authorize the averment that the state is the owner. It is further argued that the state did, in fact, know the real ownership, inasmuch as the testimony of its own witnesses tended to show that Schulke was the owner. We think the testimony by no means shows that the state was assuredly advised as to the true ownership. While certain witnesses testified that the animal bore Schulke's brand, yet the fact was not admitted, and appellant himself testified that the horse was not branded, but that he was a "slick-car," an "out-law," which, in effect, means that the real ownership was un-

known. The evidence showed plainly that the matter of the real ownership was doubtful, and it therefore made such a case as is contemplated by the statute quoted. The state was not bound to allege the individual ownership, which it might not be able to prove. The essential fact charged was that the appellant stole the animal, and this placed upon the state the burden of proving that neither the ownership nor the right of possession was in appellant, and that he took the possession with felonious intent. Appellant could not have been misled to his prejudice. If the state failed to prove the above-stated essential facts, he could not be convicted, and it was for the jury to determine what was established in that regard. Appellant was chargeable with knowledge of the law, and when he was charged with having stolen "the property of the state of Washington," he was bound to know that, under the statute cited, the charge was broad enough to comprehend unknown ownership, and it was his duty to be prepared to meet such charge.

The judgment is affirmed.

MOUNT, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 6763. Decided June 29, 1907.]

PAUL NIEMCIEK, *Appellant*, v. THE H. McCORMICK LUMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—COMPLAINT—GENERAL ALLEGATION OF NEGLIGENCE. A complaint in an action by a servant for negligence is good as against demurrer, where it alleges in general terms the failure of the master with respect to the performance of various specified duties, although it does not set out any detail concerning the acts complained of.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered September 10, 1906, upon sustain-

¹Reported in 90 Pac. 658.

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Opinion Per HADLEY, C. J.

ing a demurrer to the complaint, dismissing an action for personal injuries sustained in a sawmill. Reversed.

Forney & Ponder, for appellant.

George Dysart and Maurice A. Langhorne, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The defendant demurred generally to the complaint, and the demurrer was sustained. The plaintiff, having refused to plead further, stood upon his complaint. Thereupon judgment was entered dismissing the action, and plaintiff has appealed.

Inasmuch as the only question involved in the appeal is the sufficiency of the complaint, for convenience of reference we here set forth the principal paragraphs thereof in full:

“(2) That on or about the 25th day of May, 1905, the plaintiff was in the service of the said defendant corporation, employed for the purpose of shaping cross-arms by means of a certain machine in the defendant company’s mill at McCormick, Lewis county, Washington, known as a ‘cross-arm shaper.’

“(3) That it was the duty of said defendant company, at said time and place, to keep the said machine in a safe condition and properly guarded, but said defendant company wrongfully failing and neglecting to perform its duty in that respect, and wrongfully failing and neglecting to comply with the requirements and provisions of the laws of the state of Washington, did, during all the times herein mentioned, negligently and carelessly suffer and permit said machine to become out of repair, and did negligently allow the same to be and remain in a dangerous condition, and negligently and carelessly failed to properly guard the same.

“(4) That it became and was the duty of the said defendant to furnish plaintiff a safe place in which to work, but the defendant, failing and neglecting its duty in that respect, did, at the time aforesaid, leave the shed and place in which said machine was set in a dangerous and negligent condition and improperly lighted.

“(5) That at the time of the employment of plaintiff by defendant, said plaintiff was entirely ignorant of the nature

and character of said machine, and had never operated the same or any machine of like character. That defendant failed and neglected to instruct plaintiff at any time how to use and operate said machine, and negligently failed to warn plaintiff of the danger that might result to him in the operation thereof.

"(6) That at the times herein mentioned the material and timber to be shaped and dressed by said machine was, by said defendant company, negligently suffered and permitted to become wet and swollen so that the same when placed in said machine would not freely pass through the same, whereby the operation of said machine became dangerous to plaintiff operating the same.

"(7) That on, to wit, the 25th day of May, 1905, after plaintiff had been using and operating said machine for a period of ten days, the plaintiff while operating said machine in the said negligent and dangerous condition, in the negligent and dangerous place aforesaid, and while attempting to shape and dress cross-arms from materials furnished by said defendant, in the wet, swollen and dangerous condition as herein alleged, and without having been warned of the danger hereinbefore mentioned, was, by reason of the said negligent acts and omissions of said defendant, injured by said machine by having the index and second fingers of his right hand cut and mangled by the knives of said machine, whereby he lost both of said members."

It will be seen by reference to paragraph 3 that the respondent is charged with negligence in two respects, viz., in allowing the machine to become and remain out of repair, and in a dangerous condition, and in failing to properly guard it. In paragraph 4 it is charged that respondent negligently failed to furnish appellant a safe place to work, in the respect that it left the shed in which the machine was placed in a dangerous condition by keeping it improperly lighted. Paragraph 5 charges negligence in failing to instruct appellant how to use the machine, and also in failing to warn him of the danger, he being ignorant of the nature of the machine. Paragraph 6 charges negligence in permitting the timber which was being dressed to become wet

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and swollen so that, when placed in the machine, it would not freely pass through, and the operation thereby became dangerous. Paragraph 7 charges that, by reason of said negligent acts of respondent, the appellant was injured. Thus a number of specified and completed acts are charged as constituting negligence. It is not merely charged that respondent was negligent and that appellant was injured thereby; but the negligent acts are themselves specified. It is true the complaint does not enter into details concerning the acts charged, but it clearly charges distinct acts of negligence. This, we think, is sufficient, at least as against general demurrer.

"The rule is well-nigh universal that, in an action for negligence, the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. A general averment of negligence in the particular act complained of, resulting in damages is good, at least as against a general demurrer . . . Accordingly, a declaration specifying the act, the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice." 14 Ency. Plead. & Prac., 333, 334.

This court cited and quoted with approval a portion of the above-quoted text in *Collett v. Northern Pacific R. Co.*, 23 Wash. 600, 63 Pac. 225. To the same effect is 2 Thompson, Negligence, p. 1247, also cited in the *Collett* case. In said case testimony concerning the absence of a light at an excavation was rejected, on the ground that there was no specific allegation in the complaint upon that subject. The particular matter specified was the absence of a railing or protection to guard against the excavation. It was held that the trial court erred; that the allegations were sufficient to put in issue any negligent act of the defendant in relation to the excavation, and that the proof should not be confined merely to the absence of a railing. A number of cases are there cited and discussed, where the principle is recognized that such general allegations of negligent acts are sufficient to withstand demurrer, even in cases where one might be entitled to more

specific statement if he should move to make the complaint more specific. In the absence of such a demand, it was not incumbent upon the appellant here, when he alleged, for instance, that the machine was negligently permitted to become out of repair and dangerous by reason thereof, to also allege the minute particulars constituting the impaired condition. These belonged to the domain of evidence, and it is the ultimate fact only that the pleader is ordinarily required to state. The same is true of the other acts charged. Respondent is notified of definite acts of negligence, and it cannot by mere demurrer say that it is not liable because all the contributing elements which in the aggregate make the completed acts are not stated. Sufficient facts are stated in the complaint to constitute a cause of action as against general demurrer, and that is all that is before us for decision.

The judgment is reversed and the cause remanded with instructions to overrule the demurrer.

FULLERTON, CROW, MOUNT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6695. Decided June 29, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Kettle Falls Power and Irrigation Company, Plaintiff*, v. THE SUPERIOR COURT FOR STEVENS COUNTY,
*Respondent.*¹

EMINENT DOMAIN—PARTIES ENTITLED—IRRIGATION—PRIORITY. An irrigation company, which commenced its construction of a canal in January, 1905, had expended a large amount of money in construction work before the organization of another company in 1906, and in two years had expended \$38,000 and was provided with ample means to complete the work, is shown to have been proceeding in good faith and diligently, and has a prior right to condemn waters of a stream which are not sufficient for both companies.

¹Reported in 90 Pac. 650.

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Syllabus.

SAME—PROPERTY SUBJECT—RIPARIAN RIGHTS. The common law rights of riparian owners to the natural flow of waters of a non-navigable stream are subject to condemnation for irrigation purposes under Bal. Code, § 4143, except as to the water that is used or needed by himself for the purpose of irrigation, as provided in *Id.*, § 4156.

SAME—TRANSFER OF RIPARIAN RIGHTS—PRIORITY BETWEEN IRRIGATION COMPANIES. Where an irrigation company, prior in point of time, was already in good faith prosecuting its construction work for the use of the waters of a stream, another company acquiring riparian rights for the use of the same waters takes such rights subject to the right of condemnation existing against the riparian owners in favor of the prior company; since, as between two companies seeking to use the same waters, the one prior in time is prior in right, and the fact that the later company is a public carrier does not enlarge its riparian rights.

SAME—PRIORITY—NECESSITY OF PRIOR CONDEMNATION PROCEEDINGS. Where an irrigation company is openly and in good faith prosecuting the construction of its ditch for the use of the waters of a stream, it is not necessary that it should have previously condemned its water rights to give it priority over another company lower down on the stream subsequently seeking the use of the same waters.

SAME. Laws 1889-90, p. 718, § 42, providing that the appropriator of water rights seeking condemnation for irrigation purposes shall file a map of the location of its water ditch, etc., applies only to subd. 4 of the act relating to the "Right of Way for Ditches" of which it is a part; and upon a condemnation of water rights under subd. 5, entitled "On the Condemnation of Water Rights," it is not necessary to file any map of the location of the ditch, as the same is not required in the division of the law governing that matter.

SAME—PROCEEDINGS—REVIEW — CERTIORARI — NOTICE — WAIVER OF OBJECTION. In proceedings to condemn water rights for irrigation, one who was personally served, and appeared and contested the matter without objection to the notice, cannot claim, on certiorari, lack of jurisdiction by reason of failure to give the notice by publication required by the act of 1889-90, p. 719, § 45.

SAME—EXTENT OF CONDEMNATION—DAMAGES. Upon certiorari to review an adjudication of public use in a proceeding to condemn water rights for irrigation purposes, the respondent cannot urge error in that the decree declared condemnation of waters part of which had already been appropriated and which would reduce the damages; since that question belongs to the hearing upon the subject of damages.

Certiorari to review a judgment of the superior court for Stevens county, Carey, J., entered March 2, 1907, adjudging a public use etc., in an action to condemn the waters of a river for irrigation purposes. Affirmed.

Voorhees & Voorhees, and Chas. V. Roberts, for relator.

W. C. Stayt and Gallagher & Thayer, for respondent.

HADLEY, C. J.—A writ of review was issued by this court for the purpose of reviewing the judgment of the superior court in certain water right condemnation proceedings. The petitioner for the condemnation, the Fruitland Irrigation Company, is a corporation, organized under the laws of South Dakota, for the purpose of engaging in the business of irrigation, and it is duly authorized to do business in this state. To effect the purposes of its organization, it is empowered to acquire by condemnation or otherwise waters and riparian rights. The Kettle Falls Power and Irrigation Company, a defendant in the proceeding, is a corporation organized under the laws of this state, with purposes and powers similar to those of the petitioning corporation. The petition alleges that the Colville river is a stream which flows through a portion of Stevens county, and empties into the Columbia river, passing in its course through certain described sections of land; that the petitioner has built an irrigation ditch for drawing off the waters of said river from a point described as the point of intake, which ditch extends in a westerly and southwesterly direction, through and into the sections of land described; that the construction of the ditch was commenced in January, 1905, and has been diligently prosecuted since that time; that it is now about seven miles long; that the petitioner intends to extend it further, and is now engaged in so doing.

It is further alleged that the petitioner intends to divert one hundred and sixty cubic feet of water per second of time from said stream into said ditch, and to conduct the same by

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means of the ditch to lands lying further down the river; that it intends to furnish water for irrigating about sixteen thousand acres of land, which lie in a westerly and southwesterly direction from said point of intake; that the lands are arid or semi-arid in character, and are of small value without water with which to irrigate them, but they will become greatly enhanced in value when water can be supplied to them for that purpose; that the petitioner intends to furnish such supply by means of the diversion and ditch aforesaid, and to sell the water at reasonable rates to all persons owning lands adjoining the ditch. It is alleged that the defendant corporation and its codefendant, J. W. Reynolds, are the owners of certain described lands through which the Colville river flows, and that they are the only persons interested in said lands as owners; that the volume of water in said river at the point of intake is between two hundred and three hundred cubic feet per second of time, and that when the petitioner has diverted the one hundred and sixty feet it intends to use, there will be that much less water flowing through the lands of defendants which lie below the point of intake; that the defendants claim that their riparian rights will be affected by reason of such diversion, and that their lands will be damaged thereby. The petition concludes with the prayer that the use be declared a public one, and that the damages be ascertained.

The defendants jointly answered the petition with certain admissions and denials, and affirmatively alleged that the defendant corporation has been a corporation since the 22d day of October, 1906, and that it was created with power, among other things, to acquire and use for irrigation purposes lands, waters and water rights, and to generally engage in the business of a common carrier of water for irrigation purposes; that since its organization, it has been actively engaged in the prosecution of the object of its incorporation, it being the intention of said defendant to take water from said Colville river for the purpose of irrigating about sixteen thousand acres of land owned by many persons below the point of di-

version; that at the point of diversion of said waters there flows at the lowest stage of said river two hundred and ten cubic feet of water per second of time, and no more, and that all of said water will be necessary to irrigate said lands; that the Colville river is a nonnavigable stream, the abutting owners thereof having and owning riparian rights therein, and that below the point at which the defendant corporation intends to divert the water, there are on said stream a large number of riparian owners; that since its incorporation said defendant has by purchase acquired the riparian rights of said owners, together with lands necessary for the right of way for its canal or ditch; that the said defendant is devoting the waters, water rights, and riparian rights sought to be condemned by the petitioner to a public use, to wit, the irrigation of the lands for the public, and that such property and rights cannot be condemned for the same use by the petitioner.

Upon these issues a hearing was had, and the court found substantially as alleged in the petition, and also that the defendant corporation is the owner of riparian rights as alleged in the answer. It was especially found that the petitioner has already expended more than \$38,000 in the work of constructing its said ditch, and in preparing to divert the waters into the same; that the contemplated use and diversion of said one hundred and sixty cubic feet of water per second of time is a public use, and that there is no other practicable source from which the petitioner can obtain the necessary water for the irrigation of the lands mentioned. It was also found that the river is a nonnavigable one, and that the defendant corporation's land and water rights below the point of the petitioner's intake will be injuriously affected by the diversion of the one hundred and sixty feet of water into petitioner's ditch. It was found that the defendant corporation needs four and one-tenth cubic feet of water per second of time with which to irrigate its own lands below the point of petitioner's intake, which amount is not subject to the right of eminent domain:

that the defendant corporation has not commenced the construction of its irrigating canal or ditch by survey or otherwise, and has not performed any acts which entitle it to the rights of a public service corporation as against the rights which have accrued to the petitioner in respect to the condemnation of said waters. The decree condemns one hundred and sixty cubic feet of water as against the defendants, subject to their prior right to the use of four and one-tenth cubic feet as aforesaid, and the defendant corporation as relator has applied to this court for the review of the judgment.

It will be observed from the statement of the case, that the controversy arises from the fact that two corporations seek to use the water of the Colville river for the irrigation of the same territory. The evidence is extensive, and it would be impracticable to discuss it in detail here. We have, however, read the entire record of the evidence, and we find that the findings of the court are in essential particulars supported by the testimony. The respondent company had expended a large amount of money in its construction work before the relator company was even organized and before the latter had acquired its riparian rights upon said river. We are satisfied that the respondent was at all times proceeding in good faith with its irrigation scheme, and that it was reasonably active in pushing its construction work in view of the extent of the project. This is shown by the large amount of money it has expended upon construction, and the evidence shows that it is amply provided with funds for proceeding to the completion of the work. There is not water enough in the river to supply both companies. Both cannot occupy the same territory for the same purpose, and one must therefore yield to the other.

The relator's argument is that it is a public service corporation, organized to carry water as an irrigation company; that it owns the riparian rights sought to be condemned, and that it cannot be divested of these rights through condemnation by another irrigation company. If the relator is considered as a riparian proprietor only, its rights must be limited to

those of an ordinary riparian owner, viz., to a necessary amount of water for the irrigation of its own abutting lands. Under Bal. Code, § 4156 (P. C. § 5871), the ordinary abutting owner must submit to the condemnation of his riparian rights to the natural flow of the water as at common law, with the limitation, however, that water "that is used by said person himself for irrigation, or that is needed for that purpose by any such person" may not be condemned. Does the mere fact that relator is a public carrier of water enlarge its ordinary riparian rights and entitle it to divert all the water and carry it to distant lands, as against everyone else? If it possesses such enlarged right, it is not due merely to its riparian ownership, but rather to the fact that by its acts as a public service corporation it is in position to claim such use of the waters. If it were first in point of time in the development of its irrigation scheme, it would probably have the right to so divert the waters if no other riparian owners were concerned. But since another irrigation company was in good faith prosecuting its construction work when the relator acquired its riparian rights, we think the latter possesses no greater rights as against such company than those of any ordinary riparian owner. As a carrier it must therefore yield to the respondent company which was prior in point of time. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

In the above-cited case two boom companies sought the same location. This court said that both could not carry on their corporate business at the same place at the same time. and quoted with approval from Mills on Eminent Domain (2d ed.), § 47, as follows:

"When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right."

The above-stated rule appeals to the reasonable mind as eminently right and just. We think the fact that respondent had not commenced proceedings to condemn these riparian rights before they were acquired by the relator should not

defeat its right to now condemn them in view of all the facts. Had the individual riparian holders who transferred their rights to the relator continued to hold them, the right to condemn against them would undoubtedly have existed in favor of respondent. When relator acquired these rights, respondent was openly and in good faith occupying the vicinity with its construction work. It was not necessary that it should have previously condemned its water rights. It has been held that a landowner cannot defeat proceedings to condemn a right of way for an irrigation ditch on the ground that the condemner has not yet acquired any water rights from riparian owners of the stream it proposes to tap. *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635. By the same reasoning, an irrigation company that is alone and in good faith constructing a canal or ditch is not required to forthwith condemn its water rights. It cannot accomplish all at one time. We therefore think that, under all the circumstances surrounding the relator's acquisition of these riparian rights, it acquired them subject to the right of condemnation which existed in favor of respondent at the time the relator acquired them.

The relator argues that, as the river is a nonnavigable stream, the waters are not subject to condemnation, but that the common law right to the natural flow of water must be preserved to the riparian owner. In support of this argument, the case of *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107, is cited. That case deals with questions concerning the prior appropriation of water, based merely upon the doctrine of priority of use and possession without regard to compensation to the riparian owner. The case does not deal with the right to condemn private ownership in riparian rights where full compensation is made. The right to so condemn is fully declared by our statute, Bal. Code, § 4143 (P. C. § 5858), in the following words: "Any person, association, or corporation, desiring to condemn the riparian rights of persons in any natural stream or lake in this state, may do so as follows." The method of effecting

condemnation is set forth in the remainder of the section, and in succeeding ones, and in § 4156, hereinbefore cited, the limitation upon the extent to which condemnation may go is declared as we have seen.

It is further contended by the relator that respondent cannot condemn the water rights it seeks because of its failure to comply with certain preliminaries required by statute. The provisions upon this subject may be found in the Laws of 1889-90, at page 718 of said volume. Section 42 provides that every person or corporation constructing or enlarging any ditch and taking water directly from any natural stream or lake, shall, within ninety days after the construction, file in the office of the county clerk of the county in which the head gate of such ditch may be situated, a map showing the point of location of such head gate, the route of such ditch, and other matters specified. Following the specifications for the map and its accompanying statement, are the following words: "If such statement be filed within the time above limited, priority of right of way and water accordingly shall date from the day named as the day of commencing work. Otherwise, only from the date of the filing of the same." The relator contends that the respondent filed no such map or statement within ninety days after construction, it contending that the ninety-day period began to run with the commencement of construction. Respondent, upon the other hand, insists that the time begins with the completion of construction, which time has not yet arrived. It also insists that it has filed the map, but the relator disputes the sufficiency of the map to support the extent of the condemnation sought.

We believe it is unnecessary to discuss the respective contentions concerning the time of filing and the sufficiency of the map, for the reason that we think no map was required as a preliminary to the institution of this particular condemnation proceeding. By referring to the act of 1889-90 upon this subject, at page 706 *et seq.*, it will be observed that it is subdivided into eight divisions. Division 4 at page 715

treats of "Right of Way for Ditches." In this division is found § 42 above mentioned, which provides for the filing of a map. Not only is the stated subject of the subdivision that of right of way for ditches, but the section itself deals in terms with that subject alone. It seems to follow that, when condemnation of right of way for an irrigating ditch or canal is sought, a map must be filed in accordance with said section. This is a proceeding, however, to condemn water or riparian rights and not a right of way for a ditch. Subdivision 5 of the act aforesaid is designated as follows: "On the Condemnation of Water Rights." The method for condemning such rights is confined exclusively to subdivision 5, and includes §§ 44 to 54 inclusive of the act. This proceeding must be governed by the procedure there outlined. There is there no requirement for the filing of a map, and it follows that none was necessary.

Relator calls attention to the following words in § 42 and within the subdivision relating to right of way for ditches, to wit: "Priority of right of way and water accordingly shall date," etc. Inasmuch as the word "water" is coupled with the words "right of way," it is argued that the map requirement must relate also to the procedure for condemnation of water rights. We think not. As we have seen, both the subdivision and the section in all other respects treat of the one subject of right of way for ditches, and the use of the words "priority of right of way and water" must rather refer to the prior right to occupy the way and conduct water thereon. If the map requirement had been intended in connection with the condemnation of riparian or water rights, it would have been specified as a part of the procedure on that subject. The legislature doubtless saw a good reason why a preliminary map was necessary to designate the route of a right of way for a ditch, and it may have seen an equally good reason why it is not necessary to designate the location of riparian rights which may be known by reference to the course of the stream itself.

It is further contended by the relator that the court condemned too great an amount of water. This contention is based upon the claim that a preliminary map was necessary, and that a map which was filed by respondent did not indicate sufficient extent of contemplated construction to use the amount of water which was condemned. We have seen that the map was not necessary, and the proofs amply show that the amount of water condemned is not too much for the use of the sixteen thousand acres of land which the evidence also shows is the amount to be served by respondent's system as partially constructed, and as it is to be when completed.

The relator urges that the court was without jurisdiction to hear this matter, for the reason that notice was not given in accordance with § 45 of the act of 1890 heretofore cited. The provision calls for notice to all persons concerned, to be published in some paper, etc. Section 44 calls for the filing of a petition as the initiatory step. By the petition the court acquired jurisdiction of the subject-matter, and the relator as a party concerned appeared generally and answered, and in open court agreed that the cause should be tried, all without objection for want of notice. The objection cannot be made at this time. 15 Cyc. 844.

The question discussed by respondent with reference to its contention that it had already appropriated a part of the waters of the Colville river before it brought this proceeding, we think is not before us. The proceeding is one to condemn riparian rights. The decree is in favor of respondent, and declares what is condemned. If respondent can now show a prior ownership in a part of these waters by way of reduction of damages, that question belongs to the hearing upon that subject. We do not now decide that such showing can be made, and we decline to express any views upon the subject.

The judgment is affirmed.

FULLERTON, MOUNT, ROOT, CROW, DUNBAR, and REDKIN, J.J., concur.

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Statement of Case.

[No. 6684. Decided June 29, 1907.]

THE STATE OF WASHINGTON, *on the Relation of* HENRY
HARRIS *et al.*, Plaintiff, v. OLYMPIA LIGHT AND POWER
COMPANY *et al.*, Respondents.¹

EMINENT DOMAIN—POWER PURPOSES—FLOODING LAND. Condemnation for the purpose of developing power for street car and electric light purposes is authorized where it is sought to raise the waters in a lake to be used as a reservoir during the summer months when the supply was inadequate, and the land sought to be condemned would be covered by such raising of the waters of the lake.

SAME—TEMPORARY PURPOSES. Condemnation of land to develop power for street car and electric lighting purposes cannot be objected to as being for a merely temporary purpose, from the fact that in six years more power would probably be required, where no intention is shown to abandon the same at such time.

SAME—PARTIES ENTITLED—POWERS OF CORPORATION—PUBLIC AND PRIVATE USES. Condemnation of land to develop power for street car and electric lighting purposes cannot be objected to on the ground that the company's articles of incorporation authorizes it to sell electric light to the public, which was not a public use, thereby easily evading detection in wrongfully using the power for private purposes, where the petition and testimony show that the lands sought to be condemned are necessary for a public use, and especially where the evidence shows that the amount used for private purposes could be readily ascertained.

SAME—DAMAGE TO OTHER LANDS—DIVERSION OF WATER. A condemnation of land for the purpose of developing a water power is not objectionable on the ground that it will damage other lands by diverting water therefrom, where it is only proposed to divert water during the freshets and high water.

Certiorari to review an order of the superior court for Thurston county, Linn, J., entered February 18, 1907, in favor of the petitioner, adjudging a public use and directing the assessment of damages by a jury in a condemnation proceeding. Affirmed.

James M. Ashton and *Vance & Mitchell*, for relators.

T. N. Allen and *Troy & Falknor*, for respondents.

¹Reported in 90 Pac. 656.

MOUNT, J.—This is the second review of this case. When it was here before we held that the respondent Olympia Light and Power Company was not authorized to exercise the power of eminent domain to secure electric power for sale to the public. The cause was therefore remanded to the lower court, with leave to amend the petition so as to ask only for the condemnation of land sufficient for the purpose of furnishing electric power to operate respondent's street railway and lighting system. *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666. The petition in condemnation was accordingly amended and, upon a hearing, the trial court found, and entered an order adjudging the use sought to be a public use, and that certain of relators' lands are necessary to be taken for such use. This review is prosecuted from that order.

The respondent Olympia Light and Power Company is a domestic corporation, operating an electric street railway between the city of Olympia and the town of Tumwater and through the streets thereof, and also an electric light system in said city and town. Its electric generating plant is located at the mouth of the Des Chutes river, in the town of Tumwater. This plant is operated by means of water taken from said river. During the months of July, August, and September of each year, there is not sufficient water in the river to effectively operate the railway and electric lights, but during the rest of the year there is an ample supply of water for that purpose, and during the months from November to May of each year, when freshets and high water frequently occur, much water runs to waste. In order to conserve this waste water, respondent corporation proposes to divert the river into Lake Lawrence, a fresh-water lake, some twenty-six miles up the river from Tumwater, and proposes to raise the surface of this lake some thirty feet above its natural surface. It is proposed to divert the water from the river by a canal, the bottom of which is to be two feet above low water in the river, and by means of this canal to carry a portion of the water from the river during high water and freshets into the lake.

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and there hold the said water until the dry season, when the water in the lake will be gradually let out so as to supply a continuous flow in the river, sufficient to generate about five hundred additional horse power at the power plant at Tumwater. In order to do this, it becomes necessary to overflow a portion of relators' real estate, by the rise of the water in Lake Lawrence.

At the trial it was conclusively shown that the water in the Des Chutes river was not sufficient during the dry season in July, August, and September, to furnish power to effectively operate the railway and light plant of respondent corporation, and that frequently on that account the railway service was suspended for short intervals in those months. This, of course, showed the necessity for more power during such times. In the case of *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & Power Co.*, 42 Wash. 632, 85 Pac. 344, this court held that a street railway company might condemn lands not adjacent to its right of way, for the purpose of developing a water power to create power for its system. It is conclusively shown that the rise of the water in the lake will cover the lands sought, and since it is conceded—or, at least, was decided in this case when it was here before—that the street railway and electric lighting systems are for a public use, it follows that the respondent was authorized to condemn the land sought.

The relators contend, however, that the appropriation here sought is for a temporary purpose. This contention is based upon evidence to the effect that the additional power which will be created by the proposed improvement will be sufficient to supply the demand for the next six years only, and thereafter additional power will be required, provided the growth of Olympia and Tumwater continues in the future as is calculated by the manager of the respondent corporation. This contention seems to us to be without merit. There is no evidence in the record that the power sought is for a temporary

purpose. No intention is disclosed to abandon the water power or to substitute some other form of power. On the other hand, the respondent's manager testified that he had made inquiries as to the cost of substituting steam power for water, but that the cost of such change is prohibitory. Furthermore, there was no evidence to show that the water power now used could not be increased indefinitely by means similar to those now proposed, and sufficient water power thus acquired to meet all increased demands. Conceding, however, that the proposed improvement will not be sufficient to meet the demands after six years' time, that fact of itself is not sufficient to show a temporary use, because other power may then be used to supplement rather than displace the power in use. It is, therefore, unnecessary to discuss or pass upon the question whether lands may be condemned for a temporary use.

Relators also contend that the right of eminent domain should not be permitted in this case, because respondent's articles authorize the furnishing of power to individuals, which is not a public use; and because it is within the reach of respondent corporation to successfully evade detection in case such power shall be furnished to individuals after condemnation of relators' land for a public use. This question was before us in the case of *State ex rel. Harlan v. Centralia-Chelalis Elec. R. & Power Co.*, at page 640, *supra*, where we said:

"When a corporation, whose articles disclose purposes some of which are public and some of which are not, seeks to exercise the right of eminent domain, we may look to its application and the evidence introduced at the hearing to determine what its real purposes are. Measured by these tests, there can be no question as to the purposes of the respondent corporation; for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a

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private use, must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel it to lawfully exercise its granted privileges."

This language is especially applicable to this case and determinative of it upon this point, because both the petition to condemn and the testimony in support thereof show that the lands sought to be condemned are necessary for a public use, and that respondent corporation intends to so use it. Furthermore, the evidence fairly shows that the amount of electricity furnished for power purposes for private use may be readily determined at any time, so that the public and private uses may be readily separated.

Relators next contend that respondent corporation, if permitted to condemn in this action, will damage relators' land in a manner not mentioned in the petition. The evidence shows, that the Des Chutes river flows through relators' land at a place not desired to be taken; that such land lies between the proposed intake and outlet of Lake Lawrence, and that the water taken from the river by respondent corporation will not be permitted to flow across relators' land as it is accustomed to flow by nature. Relators argue from these facts that damages will accrue on account thereof. If this question is proper to be considered at this time, there is certainly nothing in the evidence to justify a refusal to permit the power of eminent domain for that reason. It is true the evidence shows that the river is suitable for floating logs and shinglebolts, but it is not shown that relators have ever used, or intend to use, the river for that purpose. Respondent does not propose to interfere with or divert water from the stream at low water. The bottom of the intake is to be two feet above low water in the river, so that the flow of water in the

river will be lessened only when the water is at least two feet above low water and during freshets and high water. It is difficult therefore to imagine how the rights of the relators to the ordinary flow of water in the river will be injuriously affected. If the injury arising from the diversion of a portion of the stream is remote and inconsequential, relators would not even be entitled to damages. There is nothing in the record now to even show any damages.

The other questions presented have been fully determined against relators' contention, and need not be further considered.

The order of the trial court is therefore affirmed.

HADLEY, C. J., ROOT, FULLERTON, CROW, DUNBAR, and RUDKIN, JJ., concur.

[No. 6789. Decided June 29, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Kent Lumber Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents*.¹

EMINENT DOMAIN—PROPERTY SUBJECT—PRIVATE ROAD—PUBLIC USE. A railroad operated by a lumber company is a private enterprise and the right of way is subject to condemnation, where it appears that it was built six miles through a timbered country tributary to no public business, and used only for private business of the lumber company, although the company was authorized to carry freight and passengers.

SAME—PREVIOUSLY DEVOTED TO PUBLIC USE—RAILROAD CROSSINGS. Under Bal. Code, § 4335, one railroad may condemn a crossing over, or part of the right of way of, another road if there is a necessity therefor and the same can be taken without material detriment to the established road.

SAME—PROPERTY SUBJECT—EASEMENTS—MUNICIPAL CORPORATIONS—DISPOSAL OF PROPERTY. A right of way granted to a city for a pole line may be condemned for a railway right of way, where the

¹Reported in 90 Pac. 663.

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city consents and the two uses can run together; since the city can dispose of its property, and the interests of the owner of the fee after grant of an easement are subject to condemnation.

SAME—RESTRICTION ON EASEMENT. An appropriator may limit by stipulation the rights or easements sought in condemnation proceedings.

SAME—RAILROAD CROSSINGS—NECESSITY. The necessity for condemning a railroad crossing or parts of a right of way, is a reasonable necessity.

SAME—PUBLIC USE—RESTRICTIONS AS TO RAILWAY STATIONS. The public use, and the right of a railway company to acquire right of way through a district 10 or 12 miles long, are not affected by the fact that, in order not to contaminate a city water supply, the company has agreed not to maintain stations or receive or take on passengers in such limited district, where the same appears to be a reasonable health requirement.

Certiorari to review an order of the superior court for King county, Gilliam, J., entered April 25, 1907, in favor of the petitioner in condemnation proceedings, adjudging certain lands necessary for a right of way for railway purposes. Affirmed.

Charles E. Patterson and Charles R. Crouch, for appellant.
H. H. Field and C. S. Gleason, for respondents.

MOUNT, J.—This case is presented here upon certiorari to review an order made in condemnation, adjudging certain lands necessary for the use of respondent railway company. The record shows that the respondent, Chicago, Milwaukee & St. Paul Railway Company, on April 3, 1907, filed a petition to condemn certain lands in King county for a right of way for railway purposes. The petition alleged all the facts necessary to authorize the condemnation. The relator appeared to that petition and answered, alleging in substance that the relator is a railroad corporation engaged in carrying passengers and freight for hire, and that it had appropriated a portion of the lands claimed by the petition for a public use, and was and is occupying the same with a railroad. It also alleged

that the city of Seattle had heretofore acquired an easement for erecting and maintaining pole lines for the transmission of light and power on and across all the lands sought by petitioner, and that if petitioner were allowed to acquire the right of way sought, the same would be detrimental to the easement of the city of Seattle. The answer also alleged that the city of Seattle had passed an ordinance authorizing the petitioner to occupy the lands sought as a right of way for its railway, provided the petitioner would not permit its cars to be open while running through Cedar River valley and over the lands sought to be condemned, the distance being about ten miles, and not permit ingress and egress to and from its trains, or receive or discharge freight, or maintain yards, switches, or other railroad facilities thereon; and that the petitioner had accepted and agreed to the conditions of such ordinance. It was alleged that, by reason of these facts, the petitioner is not a public service corporation as to that locality, and should not be permitted to condemn the interest of relator in said lands.

Upon the trial of the issues made by the pleadings, the facts appeared in substance as follows: The relator is a domestic corporation. One of its powers defined by its charter is to build, operate, and maintain railroads in King county, and carry freight and passengers over the same for hire. It owns and operates sawmills at Kent, its principal place of business. It also owns large tracts of timber lands in King county along Cedar river. In 1904 the city of Seattle acquired from relator, by condemnation for pole line purposes, a strip of land lying on both sides of Cedar river and west of Cedar lake. This strip of land is from eight hundred to twelve hundred feet in width. At the time of the condemnation by the city, the rights were reserved to the relator, the owner of the fee, to remove timber and maintain and construct logging roads over the said land for a certain length of time. The relator has constructed a railroad along the Cedar river, and along the city pole line right of way, for a distance of some two or

three miles, and has in operation, including side tracks, about six miles of railway. This railway has been used for hauling logs to its mills at Kent. It has not done, nor has it pretended to do, a public business. In 1906 the respondent, Chicago, Milwaukee & St. Paul Railway Company, located its route of railway along Cedar river and through the lands which the city of Seattle had condemned for pole line purposes. The city of Seattle by ordinance granted the railway company a right of way one hundred feet wide, through the lands in dispute, upon condition that no station should be established between certain points and no stops made by trains for the purpose of receiving or discharging passengers upon the lands so granted, and other conditions. These conditions were accepted by the railway company. At two places the right of way sought to be condemned in this action infringes longitudinally upon the railway of relator for short distances, and at another place the two lines cross each other. In the petition for condemnation the respondent stipulates to erect and maintain an overhead crossing for relator, and a written stipulation to the same effect was filed at the trial.

The relator contends, first, that, because it is a public service corporation, the respondent company is not authorized to condemn any part of relator's railway. The record in this case is convincing that relator's railroad is in no sense a public service road. It is true, the articles of incorporation recite that one of the purposes of the Kent Lumber Company is to construct railroads and to carry freight and passengers thereon, and it is true that the corporation has built about six miles of road, including side tracks, through a timbered section of country; and there was also evidence to the effect that relator was willing to carry freight and passengers for the public for hire. But it was also shown that there was no substantial equipment for such service. The Kent Lumber Company maintains no stations, and no schedules for train service, and no rates for freight or passenger traffic. The road was so located that there is no public business tributary to it, and

it does no business except the private business of the Kent Lumber Company. We think the trial court correctly found that relator's railroad was a private enterprise, for use only in its own private business, viz., hauling logs and timber to its mill, and therefore was subject to be condemned. But even if relator's road were a common carrier, the respondent company was authorized to condemn a crossing under the provisions of the statute, Bal. Code, § 4335 (P. C. § 7090); and also to take a portion of its right of way or road where there is necessity therefor, and where the same may be taken without material detriment to the established road. *State ex rd. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 Pac. 332, and cases cited. The law is also settled in this state that respondent may limit by stipulation the rights or easements which it seeks to acquire, and such stipulation is binding upon the landowner. *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Ter. 38, 13 Pac. 186; *Seattle etc. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Seattle etc. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498.

Relator also contends that respondent might have located its right of way at some place other than the place selected, and some evidence was introduced to this effect. But the term "necessity," as used in the statute, does not mean an absolute necessity and that there shall be no other place for the location of the road, but means a reasonable necessity depending upon the circumstances of the particular case. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; 2 Lewis, Eminent Domain (2d ed.), § 393. We think such necessity is shown here.

Relator also contends that, because no station will be permitted and no traffic received by the respondent railway company for a distance of some ten or twelve miles along the Cedar river, therefore the enterprise is not a public use within this limited territory, and that the right of eminent domain should be denied. It was shown that this condition was demanded by the city of Seattle and accepted by the respondent

company, in order that the water supply of the city might not be contaminated by the operation or construction of the road. This seems to have been a reasonable requirement for the protection of the health of the citizens of Seattle. The fact that for a distance of ten or twelve miles the railway company agrees not to maintain stations or receive and discharge passengers or freight, does not take away the public character of the railway or make it any the less a common carrier. There are of necessity long stretches of track where trains do not stop for business and where no stations are maintained. Business is received at reasonable intervals and fixed places where the public are best and most reasonably accommodated. These intervals are sometimes regulated by the statute and sometimes by the carriers themselves. But where the statute does not fix such stations, it would seem that a landowner could not, as a matter of right, demand a station on his property or at some place designated by him, and in case of the refusal of the carrier to comply with such demand, that such carrier would thereby change its character as a common carrier. Stations must be established and business received at certain reasonable points. Otherwise the business of the carrier might become impossible of orderly transaction. The fact that the railway company agrees not to construct a station or to receive business within the limited district, appears upon this record to be reasonable. It clearly does not take away from the respondent the right or power of eminent domain.

It is also contended that the respondent railway company is not authorized to appropriate this land, for the reason that it has already been appropriated by the city for a pole line for the transmission of electricity to said city and for the further purpose of protecting its water supply. We may assume for the purposes of this case, without deciding, that relator can raise these objections. It appears, that the city has granted its permission for a right of way to respondent company; that the city has power to acquire property or to dispose of the same as the interests of the same require. Pierce's Code,

§§ 3728, 3732, 3735 (Bal. Code, §§ 735, 739, 742); § 1 of the city charter. While the city does not own the fee, it owns an interest in the land which may be waived or granted to another public use (*Seattle v. Columbia etc. R. Co.*, 6 Wash. 379, 33 Pac. 1048), subject to the rights of the owner of the fee. Whatever rights the owner of the fee has left are subject to condemnation for a public use, especially where the two uses can run together, as appears to be the case here.

We find no error in the record. The order of the lower court is therefore affirmed.

HADLEY, C. J., DUNBAR, ROOT, FULLERTON, CROW, and RUDKIN, JJ., concur.

[No. 6164. Decided June 29, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. MORRIS PIENICK,
Appellant.¹

ARSON—CORPUS DELICTI—EVIDENCE. In a prosecution for arson the *corpus delicti* is not established by the fact of the burning of a building, as the presumption is that it was by accident or natural causes.

SAME—SUFFICIENCY OF EVIDENCE. A conviction for arson is not sustained by purely circumstantial evidence creating a suspicion against the accused, unless he is connected with the crime beyond a reasonable doubt, or the circumstances are irreconcilable with his innocence; and where such evidence is consistent with the hypothesis of his innocence, and absolutely no motive was shown, the *corpus delicti* was not established beyond a reasonable doubt and the supreme court will reverse the judgment; although the trial court refused to set aside a verdict of guilty.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered December 18, 1905, upon a trial and conviction of the crime of arson. Reversed.

Fred Parker, Fremont Campbell, and Graves, Palmer & Murphy, for appellant.

¹Reported in 90 Pac. 645.

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Opinion Per CROW, J.

Crow, J.—The appellant Morris Pienick has been convicted of the crime of arson, and appeals to this court. He contends that the evidence was insufficient to sustain a conviction.

After a jury has weighed the evidence and the trial judge has declined to set aside its verdict, an appellate court should exercise the utmost caution in disturbing the verdict. Yet in this case, having examined the entire record, we feel it our duty to award a new trial for want of evidence sufficient to warrant conviction. The fire occurred in a two-story building at the intersection of two business streets of North Yakima. In this building was a room occupied by a clothing store in which the appellant was employed as salesman, bookkeeper, and cashier. Fronting on Yakima avenue, were windows and glass doors which afforded a view of the interior to passersby. The ceiling was about sixteen feet in height. Towards the rear was a light-well through the second story to the roof. The ceiling was of wood, and the floor above rested on wooden joists. Between the ceiling and second floor was electric wiring for lights, including two arc lights in the storeroom. In addition to shelving along the sides and tables down the center of the room, were several wooden boxes on which clothing was kept. These boxes were under the light-well and the ceiling surrounding it. The business belonged to the Famous Clothing Company, a corporation, substantially all the capital stock of which was owned by an uncle of appellant. The business was in charge of one J. L. Mossler, who as manager was conducting an auction sale.

The evidence against the appellant was largely circumstantial. It tended to show that appellant and the manager left the store together, on Saturday, May 20, 1905, about 10:40 p. m., the manager going to his hotel and appellant to a restaurant; that appellant intended to return, make up his books, and write a letter to his uncle, giving a report of the business; that he did return in about fifteen minutes; that he unlocked the store, left the front door open, turned on both arc lights,

made up his accounts, and wrote his letter ; that he was within view of several people who passed by, one of whom saw him arranging some clothing in the back part of the room ; that the clothing in that part of the store, which was usually kept on the boxes, was of the cheaper grades ; that appellant turned off the lights, locked and left the store about 11 :30 p. m., or a little later ; that he mailed his letter, walked to his room some six or seven blocks distant, and went to bed where he remained until the fire alarm was sounded, when he arose, dressed and, with a lodger who occupied the adjoining room, went to the fire, and that on their way they met parties who told them the fire was in the Famous Clothing Company store.

The state's evidence further shows, that the fire alarm was sounded about twelve o'clock ; that the firemen arrived a few minutes later, and gained admission by breaking the front door ; that the room being filled with smoke prevented them from seeing clearly or entering more than a few feet ; that immediately they threw water from fire hose to the back part of the room where the boxes were located, and some fire was seen : that flames then arose almost to the ceiling ; that the fire was soon extinguished below, but as it was burning in and above the ceiling, the firemen repaired to the upper floor where they succeeded in extinguishing it ; that a large portion of the ceiling and upper floor fell, many of the joists being burned through ; that the burned portion of the ceiling was above the boxes on which the cheaper goods had been placed ; that after the fire was extinguished, one Marsh, a rival clothing merchant, accompanied by a policeman who carried a lantern, entered the store and found the boxes arranged in a hollow square ; that partially burned clothing and some paper handbills were on the floor within this square ; that the boxes still remained intact, being burned only on the sides next to the clothing ; that Marsh took some of the clothing to the street ; that it smelled of some kind of oil which he and some other witnesses thought was kerosene ; that the floor of the room was

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not burned through, nor were the boxes of clothing entirely destroyed; that during the fire appellant made certain remarks showing indifference as to its destructive effects; that the auction sales had not been well attended; that the lease for the room had expired and the owner of the building had not consented to a renewal. These facts, which create suspicions against the appellant, are substantially all the facts upon which the state relied for conviction. Other undisputed facts favorable to the appellant will be hereinafter mentioned.

The appellant contends that the evidence was not sufficient to show the *corpus delicti*, or to establish his guilt beyond a reasonable doubt. Proof of the single fact that a building has been burned does not show the *corpus delicti* of arson, but it must also appear that it was burned by the wilful act of some person criminally responsible, and not as the result of natural or accidental causes. Where a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused. 3 Cyc. 1003; *State v. Jones*, 106 Mo. 302, 17 S. W. 366; *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275; 4 Elliott, Evidence, § 2807.

Circumstantial evidence only was produced by the state to show that the fire was of an incendiary character. No one saw appellant fire the building, nor has any motive for his doing so been shown. The arrangements of the boxes, the position of the clothing, the odor of kerosene, and the recent presence of appellant in the store are the circumstances relied upon to show that the fire was of an incendiary character.

"No general rule can be laid down as to the quantity of circumstantial evidence which in any case will suffice. All the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt." 12 Cyc. 488.

See, also, *State v. Morney*, 196 Mo. 43, 93 S. W. 1117.

In *State v. Payne*, 6 Wash. 563, 34 Pac. 317, this court, in passing on an assignment of error similar to the one here involved, said:

"No man ought to be convicted of a crime upon mere suspicion, or because he may have had an opportunity to commit it, or even because of bad character, and where circumstances are relied on for a conviction they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond a reasonable doubt."

The case of *Williams v. State*, 85 Ga. 535, 11 S. E. 859, cited with approval by this court in *State v. Payne*, *supra*, was one in which the defendant had been convicted of arson. The facts there proven are set forth in the statement, and create as much suspicion against the accused as the facts in this case. The supreme court of Georgia, however, in reversing the judgment of conviction, said:

"The evidence in a criminal case must be sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the accused, before they are authorized to find a verdict of guilty. The evidence in this case raises a suspicion against the accused, but we do not think it connects him with the crime beyond a reasonable doubt; and for this reason we reverse the judgment of the court below in refusing to grant a new trial."

In *State v. Morney*, *supra*, an arson case, the supreme court of Missouri, discussing circumstantial evidence, said:

"Where a chain of circumstances leads up to and establishes a state of facts inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence, but the chain, as it were, must be unbroken, and the facts and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction."

See, also, the following cases, in which the evidence was held insufficient to sustain convictions of arson: *Jones v. Commonwealth*, 103 Va. 1012, 49 S. E. 663; *People v. Johnson*, 70 App. Div. 308, 75 N. Y. Supp. 234; *People v. Wagner*, 71

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App. Div. 399, 75 N. Y. Supp. 950; *Brown v. Commonwealth*, 87 Va. 215, 12 S. E. 472; *People v. Kelly*, 11 App. Div. 495, 42 N. Y. Supp. 756; *Anderson v. Commonwealth*, 83 Va. 326, 2 S. E. 281.

Are all of the circumstances of this case consistent with the hypothesis of appellant's guilt, and at the same time inconsistent with the hypothesis of his innocence? We think not. The undisputed evidence shows that the greatest damage resulting from the fire was to the ceiling, the upper floor, and the joists between them; that the lower floor, although burned, was not destroyed; that the ignited clothing was not entirely consumed; that the boxes remained sufficiently intact to be produced and identified at the trial; that a former tenant who had occupied the room a short time previously had frequently applied to the floor an anti-dust preparation of oil which resembled crude petroleum; that appellant actually wrote and mailed his letter and report; they being produced at the trial with the postmarked envelope; that the stock was not over-insured; that the ceiling and upper floor burned near the electric wiring and over the boxes and clothing; that when the firemen entered the building they turned a stream of water on the boxes; that this occurred before Marsh and the policeman entered the room, and that the appellant advised his uncle of the fire immediately by wire. There is an utter absence of evidence showing any motive on the part of the appellant. It affirmatively appears that he had no interest in the stock or business. It is not shown that he entertained any malice toward the owners of the building or stock of goods, that his books were burned, that he was a defaulter, that the store contained any books, papers, or documents which he wished to destroy, or that he would gain any benefit from the fire.

In *State v. Morney*, *supra*, the supreme court of Missouri further said:

"In this case there was also an absence of any proof of an inducing motive for the burning of the building by defendant. There is no pretense that the defendant derived or expected to

derive benefit of any kind from the burning of the building, or that he entertained malice or ill will towards its owner; and, while this does not disprove defendant's guilt, the absence of any motive for the crime should under the circumstances disclosed by this record be taken into consideration in passing upon the question of his guilt."

It may be here noted that, although many entered the store and examined it shortly after the fire, no one other than Marsh, the rival clothing merchant, was shown to have discovered any goods smelling of kerosene. There is no evidence that the appellant had any kerosene about the store or elsewhere under his control, or that he had recently purchased any. The identical clothing removed by Marsh was turned over to the fire department, and two of the firemen who examined it next day failed to discover any odor of kerosene. Other witnesses who examined it on the night of the fire were unable to detect any such odor. The appellant, when in the store shortly before the fire, made no attempt to conceal his movements, but had turned on both arc lights, had left the front door open so that any one might enter, and was at all times in full view of many passersby who had been attending public affairs in North Yakima, one being a dance in a hall about two hundred yards distant.

The theory of the appellant is that the fire started between the ceiling and upper floor, from some defect in the electric wiring, where it first burned above the boxes on which the clothing was placed; that having burned through the ceiling, it fell on and ignited the clothing; that the force of water from the fire hose disarranged the boxes and pushed the clothing to the floor, where it smouldered without burning through the flooring or entirely destroying the boxes; that if any odor of oil in fact existed, it either came from the floor which had absorbed the preparation applied by the former tenant, or from burning paint. He insists that the evidence can only be reconciled with this theory, as the greatest destruction resulting from the fire was in the ceiling, joists, and upper floor.

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where it must have started, and not in the clothing, boxes, or floor below where the state contends the fire was started by the appellant; that if the fire had been communicated to the ceiling from the clothing and boxes, the greatest destruction would have occurred below. This appeals to us as a reasonable explanation of the origin and character of the fire. The undisputed facts and circumstances satisfy us that the *corpus delicti* has not been proven beyond a reasonable doubt.

While we seriously hesitate to set aside the verdict of a jury for insufficiency of evidence, especially after the trial judge, who saw the witnesses and heard them testify, has refused to do so, we are nevertheless impressed with the conviction that injustice may be done, and that a possibly innocent man may suffer if the judgment in this case is affirmed. The law presumes the innocence of the appellant until his guilt is established beyond a reasonable doubt. We do not feel that we are invading the province of the jury in holding the evidence before us insufficient to warrant a conviction. No motion for a directed verdict was made at any time before the case was submitted to the jury, but the appellant did interpose a motion for a new trial, after verdict and before judgment, which motion, for reasons above stated, should have been sustained.

The judgment of the superior court is reversed, and the cause is remanded for a new trial.

ROOT, DUNBAR, RUDKIN, and MOUNT, JJ., concur.

[No. 6680. Decided June 29, 1907.]

JOHN WELCH, Respondent, v. P. J. FRANSIOLI, Appellant.¹

NEGLIGENCE—PLEADING—COMPLAINT—MAKING MORE SPECIFIC. In an action for negligently causing the death of a horse, a motion to make the complaint more definite and certain is properly overruled where the acts of negligence are set forth with more than common particularity.

SAME—EVIDENCE—RELEVANCY—SIMILAR CONDITIONS. In an action for negligently overdriving a horse, it is not error to exclude a question by defendant as to whether a witness had not driven the distance in less time with one horse, where the horse in question was one of a heavy coach team drawing a heavy buggy with four passengers, and where defendant was not deprived of showing the time in which the same could be safely driven with similar rigs.

SAME—CAUSE OF INJURY TO HORSE—EXPERT EVIDENCE—CARE REQUIRED—APPEAL—HARMLESS ERROR. In an action for negligently overdriving and causing the death of a horse, evidence of veterinary surgeons as to the proper treatment for a sick horse is not prejudicial error where it was introduced for the purpose of showing the condition of the horse and the cause of its death; especially where in order that the jury be not misled, they were instructed that the defendant need not have the knowledge or experience of an expert horseman or veterinary surgeon, but only that of an ordinarily careful man.

TRIAL—NONSUIT—CONFLICTING EVIDENCE. A nonsuit is properly denied where there was sufficient competent evidence to sustain the verdict, although the same was conflicting.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 29, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a liveryman for damages for the death of a horse hired by the defendant. Affirmed.

Walter Loveday, for appellant.

Marshall K. Snell and *Bertha M. Snell*, for respondent.

DUNBAR, J.—This is an action for damages for the death of respondent's horse, alleged to have been caused by the neg-

¹Reported in 90 Pac. 644.

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Opinion Per DUNBAR, J.

ligence and wrongful treatment of appellant. Respondent is a livery stable keeper, in the city of Tacoma, and appellant is one of his patrons. On April 1, 1906, appellant hired a team of horses and a carriage from respondent, for the purpose of taking a drive for pleasure. He had with him his wife, daughter, and a lady visitor. After the return to appellant's residence, he hitched the horses in front of the house on the other side of the street, and telephoned respondent's stable to take the horses back. Shortly after having telephoned, some one informed him that one of the horses had fallen down. He immediately telephoned the barn again, and undertook to revive the horse by throwing water on its head. The horse got on his feet and was taken to the stable, where it died that night. The action was brought for the sum of \$300, the cause was tried to a jury, and a verdict was returned for the full amount. Judgment was entered and appeal taken.

The first assignment is that the court erred in denying appellant's motion to make the complaint more definite and certain, it being claimed that it did not state the special acts of negligence upon which the respondent relied. It is the settled law of this state that any acts of negligence can be proven under a general allegation; but in addition to this, an examination of the complaint shows that the acts of negligence are set forth with more than common particularity, and it is difficult to understand how the complaint could have been amended in this respect. The court deemed the complaint sufficiently specific, and we think it did not err in the ruling made.

It is also contended that the court erred in excluding the question asked by appellant of a witness, Charles Bain: "Haven't you driven it (referring to the distance driven by appellant) in considerably less time with one horse?" There are so many different kinds of horses, some being roadsters and attached to light rigs, others heavy horses, attached to heavier rigs—in this instance the team being a heavy coach team—that the time consumed in driving the distance with one horse with a light rig, it seems to us, was no indication of the

time which ought to have been consumed in driving this team with a heavy buggy and four passengers. Appellant was not deprived of the privilege of showing in what time the distance could have been safely driven, or was driven, under similar circumstances and with similar rigs.

It is also alleged that the court erred in permitting the testimony of veterinary surgeons as to what was proper treatment for a sick horse. The record shows that this testimony was not introduced so much for the purpose of proving the proper treatment from an expert standpoint, as it was to show the condition of the horse and the cause of such condition. This the respondent was entitled to prove; and in order that the jury might not be misled in this respect they were instructed by the court as follows:

"It is not required of the defendant that he should have the knowledge and experience of an expert horseman, or the knowledge of a veterinary surgeon; and he is not culpable or liable to respond in damages because he may not have that skill. The test is what an ordinary man would have done under the circumstances. He could not misuse and abuse the animal in a wilfully careless or brutal spirit. He was obliged to use that ordinary care which a man would take of his own property under the circumstances, and so do what he considered best or proper to be done, and if he acted as an ordinarily careful man would act under the circumstances, the law does not charge him with any negligence sufficient to fix upon him a liability to respond in damages for the loss of the animal. So it is largely and entirely a fact for you to determine whether or not under the evidence submitted to you the defendant was guilty of negligence or not for the manner in which he treated the plaintiff's horse."

We observe no error of the court in giving or refusing to give instructions. The instructions given presented the issues clearly and fairly, and the instructions requested, which properly stated the law and were applicable to the case, had already been given by the court.

It is also contended that the court erred in denying appellant's motion for a nonsuit, and this is the most pertinent

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assignment, for the record discloses that the case presented substantially only questions of fact, and all questions concerning the treatment of the horse by the appellant, the cause of his death, whether by colic or overdriving, etc., were presented to the jury. The testimony on all essential points being conflicting, and there being sufficient competent testimony to sustain the verdict, and no prejudicial error appearing in the record, this court would not be justified in reversing the judgment, and it is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, and CROW, J.J., concur.

[No. 6681. Decided June 29, 1907.]

A. G. LAMPE, *Respondent*, v. ANTHONY JACOBSEN,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—QUESTIONS FOR JURY. In an action for injuries sustained by a pedestrian in a collision with an automobile at a street crossing in the business center of a city, the questions of negligence and contributory negligence are for the jury, where the evidence is conflicting as to the speed of the automobile, whether it could have been stopped in time, and as to the distance from the sidewalk to the place of the accident.

CONTINUANCE—PLEADING—AMENDMENT AT TRIAL—SURPRISE—DISCRETION. In an action for injuries sustained by a pedestrian in a collision with an automobile, it is not an abuse of discretion to refuse a continuance upon allowing a trial amendment to the complaint to show that the machine was driven by defendant's servant instead of by defendant, and to show that the driving was "negligent" in addition to being "wilful," where, on application for continuance by defendant on the ground of surprise, no showing was made that defendant could not safely go to trial.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 19, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries. Affirmed.

¹Reported in 90 Pac. 654.

Granger & Magill, for appellant, to the point that the plaintiff was guilty of contributory negligence, cited: *Newark Passenger R. Co. v. Block*, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, 60 N. W. 293, 47 Am. St. 507, 26 L. R. A. 300; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Est v. Brooklyn City R. Co.*, 45 N. Y. 627, 19 N. Y. Supp. 130; *McQuade v. Metropolitan St. R. Co.*, 17 Misc. 154, 39 N. Y. Supp. 335; *Doller v. Union R. Co.*, 7 App. Div. 283, 39 N. Y. Supp. 770; *Kelly v. Hendrie*, 26 Mich. 255.

H. E. Foster, for respondent.

Root, J.—This is an action for damages for personal injuries, occasioned by a collision between plaintiff and an automobile driven by a servant of appellant. From a judgment for \$1,000 in favor of plaintiff, this appeal is prosecuted.

While there is much conflict in the evidence as to certain details, yet the substantial facts were about these: Plaintiff was on the sidewalk on the east side of First avenue, at its intersection with Marion street, in the city of Seattle. First avenue runs north and south, or approximately so. He walked north along the sidewalk some twenty or thirty feet from the corner, and then stepped into the street and started in a north-westerly direction diagonally across First avenue. After taking a few steps from the sidewalk, he was struck by defendant's automobile, which was going in a northerly or north-easterly direction. The evidence varies as to the distance plaintiff had traveled after leaving the sidewalk. Some of defendant's witnesses stated it to be four or five steps. Some of plaintiff's thought it a little more. One said he had nearly reached the street car track near the center of the street. Some fixed the distance from the edge of the sidewalk as four or five feet. Others as ten or twelve. One witness thought it about thirty. There was also a difference in the evidence as to the distance from the sidewalk of the approaching automobile. Some fixed the distance as four or five feet, and others

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said that it was a greater distance, some saying it was near the car tracks. There was also a conflict as to the speed of the automobile, the driver thereof fixing it at four or five miles an hour, while others placed it as high as ten or twelve. A city ordinance limited the speed to eight miles per hour. Respondent claims that there was no horn sounded or other warning given of the approach of the automobile, and in this he is corroborated by several witnesses. The chauffeur testified that he sounded the horn when approaching Marion street which crosses First avenue a short distance south of where the accident occurred. He says that plaintiff walked directly in front of his machine, and he did not see him until within four or five feet, and it was then too late to stop. Another of defendant's witnesses testified that he was experienced in the handling of automobiles, and that such a machine, driven at the rate of six miles an hour, could be stopped within a distance of six inches.

First avenue, at the place where this collision occurred, runs through the business portion of the city, and is commonly occupied by large numbers of pedestrians. At the street crossings there is no difference in the pavement from that which extends the full distance of the blocks between the crossings, and it is customary for people to walk across the street at any place. The evidence of the witnesses for both parties shows that there was no obstruction in the street between the point where plaintiff stepped from the sidewalk and the place where the automobile was at that time. One witness testified that the chauffeur could have seen plaintiff at least for six or eight paces before his machine struck him. Plaintiff testifies that, as he started from the corner of the street, he looked up and down, but saw no automobile; that he then walked along a few steps and started across the street, his attention at that time being upon three street cars, one going in one direction and two in the other, upon two parallel tracks near the middle of the street, and that he did not see or hear the automobile until it struck him.

The evidence was also conflicting as to the effect of the collision. Several witnesses stated that the plaintiff was knocked or pushed by the automobile some five or six feet before the latter came to a stop. Others testified that it stopped almost instantly after the collision. It seemed to be conceded that when it came to a stop, one of the front wheels was upon the body of plaintiff, while the opposite rear wheel was against one of his legs. He was taken from under the machine in an unconscious condition.

Appellant contends that there was not sufficient evidence to go to the jury upon the question of defendant's negligence, and also urges strenuously that the evidence shows contributory negligence on the part of the plaintiff. The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. The pedestrian, also, must use such care as an ordinarily prudent man would use under like circumstances. As before stated, there was much conflict as to the details of the occurrence which resulted in plaintiff's injury; but we think there was ample testimony to go to the jury upon the questions of defendant's negligence and plaintiff's contributory negligence, and that the record is such that we cannot disturb the jury's conclusions thereupon.

In the complaint as first filed it was alleged that the horseless carriage was being driven by defendant. Upon the trial plaintiff asked and was given permission to amend his complaint so as to allege that said machine was driven by the said defendant "by and through his servants and agents then

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in the line of duty of said servants and agents." It was first alleged that the machine was run "recklessly, wantonly, and wilfully on and over this plaintiff." Upon the trial the words "and negligently" were permitted to be inserted after the word "wilfully," and other portions of the complaint were amended to correspond. Defendant excepted to the allowance of these amendments, and asked for a continuance on account of their being permitted, but made no showing to the effect that he could not safely go on with the trial. The application for a continuance was denied, and this action of the trial court is alleged as error. The granting of amendments and continuances is largely a matter of discretion with the trial court, and in the absence of abuse will not be reviewed here. In the light of the facts revealed by this record we do not think the trial court abused its discretion.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, DUNBAR, RUDKIN, and CROW, JJ., concur.

[No. 6670. Decided June 20, 1907.]

ALLEN H. REYNOLDS, *Appellant*, v. PERCY C. HOLLAND,
Respondent.¹

LIBEL—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action by an attorney for libel in publishing that he charged an excessive fee for the foreclosure of a mortgage when the work was done by defendant's attorney, evidence on the part of the plaintiff that he was attorney of record in the foreclosure suit and had not been released by the mortgagee from responsibility, is admissible.

SAME. In such an action, evidence that the fee allowed in the decree was excessive, offered by the defendant to sustain the truth of the charge, is inadmissible, since the allowance was to the client and had no bearing on the issues involved.

¹Reported in 90 Pac. 648.

SAME—WHAT CONSTITUTES—TRUTH OF CHARGE—BURDEN OF PROOF—TRIAL—VERDICT. Under Bal. Code, § 7087, defining libel to be the defamation of a person by words tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, a newspaper article holding up an attorney to public ridicule for refusal to pay bills for printing and for charging excessive fees is libelous, and the burden of establishing the truth is on the defendant; and where the publication is admitted and no evidence in justification is offered as to the matters libelous *per se*, the jury should be instructed to award damages therefor.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 18, 1906, upon the verdict of a jury rendered in favor of the defendant, in an action for libel. Reversed.

Edward C. Mills and *T. P. & C. C. Gose*, for appellant.

Cary M. Rader, *Will R. King*, and *Elihu F. Barker*, for respondent.

ROOT, J.—Appellant, a practicing attorney, brought this action to recover damages on account of the publication of alleged libelous matter in a newspaper managed by respondent. The case was tried to a jury, which returned a verdict for defendant. A motion for a new trial was interposed and denied, and a judgment was thereupon entered for respondent. Appeal is taken therefrom.

Plaintiff alleged in his complaint three causes of action. At the close of the evidence, the second of these was by the trial court withdrawn from the consideration of the jury. The first cause of action set forth the publication by defendant in his newspaper of the following article:

“Pecksniff and Shylock Outdone.

“Six months ago the Statesman published for Attorney Allen H. Reynolds, a legal notice of nineteen inches, which was run in six issues and for which a bill of \$28.50 was rendered. When the bill was presented to him Attorney Reynolds tendered five dollars in payment, complaining that the charge was excessive. In fact the rate charged Reynolds was no more than is paid by local merchants for advertisements, and as

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low as the rate paid by the city and county for the publication of notices. Yesterday Mr. P. C. Holland, proprietor of the Statesman, paid Mr. Reynolds, as attorney for The Farmers' Savings Bank, a fee of \$221.33 for merely nominal services in connection with the foreclosure of a mortgage of \$2,213.33, including interest, held by the Bank. Nearly all the papers in the proceedings, including the decree of the court, were prepared by Mr. Holland's attorney, C. M. Rader. The only services performed by Attorney Reynolds was to walk to the county clerk's office and file a complaint prepared by himself. The maximum attorney's fee allowed by law is 10 per cent. on the face of the mortgage, and Reynolds, like Shylock, demanded the fulfillment of the law to the last cent and the last pound of flesh. Reynolds got his money, but the Statesman's bill for publishing his legal notice is still unpaid and will probably remain unsettled until payment is enforced in court.

"For walking to the court house, about four blocks, Attorney Reynolds charges \$221.33. A messenger boy would have done the same service for 15 cents. Mr. Reynolds poses as one of the founders of the Y. M. C. A. in this city, and as an exemplar of the Christian belief and practice. He is a professed believer in the Golden Rule laid down by his Master, 'Do ye unto others as ye would they should do unto you.' Ostensibly he spurns the modern rule of David Harum, 'To do to the other fellow what he is trying to do to you, and do it first.' Perhaps Mr. Reynolds can explain to the young men of the Y. M. C. A., who look upon him as a model of purity, goodness and uprightness, how he squares the Golden Rule with his refusal to pay Mr. Holland's moderate bill of \$28.50 for printing his legal notice of nineteen inches six times, while he charges Mr. Holland \$221.33 for walking four blocks to the county clerk's office. One plausible explanation might be that it was the only case Attorney Reynolds has had in court for months, and he charged merely enough to cover his expenses during his long period of idleness. Such a charge for running an errand is liable to demoralize the messenger service of this city, and lead to a serious strike among the boys for higher pay. Why should any boy be paid only 15 cents for running a mile and back on an errand, while Allen Reynolds gets nearly \$225 for walking four blocks? It is hardly likely that Attorney Reynolds will say that he made his maxi-

num charge to get even with the Statesman for charging more than five times what he was willing to pay for the publication of his legal notice. Revenge is inconsistent with the religion which teaches that one smitten on one cheek should turn the other for a buff. Old Pecksniff might have found excuses in his sophistry and hypocrisy for professing the meekness and lowliness of the Saviour, and at the same time practicing the business methods of a Shylock, but certainly the immaculate Allen Reynolds, the paragon of moral excellence and Christian practice, would not entertain ideals so base. If any one else but the preeminently good and moral Allen Reynolds were to make such charge of messenger service under the guise of law practice, he would run the risk of being called a shyster, a 'snitch,' a grafter, or a pettifogger, but of course no one would think of applying such terms of opprobrium to the professed local prototype of the perfect man. Like the great and good John D. Rockefeller, Mr. Reynolds probably looks forward to the day when he can use some of the tainted money secured by such methods in promoting Christian institutions for the betterment of his fellow man."

The third cause of action alleged another publication having reference to the matters referred to in the other article and containing numerous offensive strictures upon appellant. It appears that plaintiff requested defendant to publish some advertisements, and that defendant did so and presented a bill for \$28.50 for this service. The plaintiff refused to pay the bill, claiming that it was an excessive charge, and also claimed that he had an agreement whereby such publication was to be made for the sum of \$5.

Concerning the attorney fee alluded to in the publication quoted, the record shows that the Farmers Savings Bank brought an action in the superior court for Walla Walla county against the Statesman Publishing Company and other parties, including this respondent. This action was to foreclose a mortgage for the sum of \$2,213.33. Appellant was the attorney for the Farmers Savings Bank in said action. The complaint therein alleged that the sum of \$225 was a reasonable sum to be allowed as an attorney's fee for the

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foreclosure of said mortgage. Respondent was the holder of a second mortgage upon the same premises, and intervened with a cross-complaint to foreclose his mortgage, amounting to twelve or fifteen thousand dollars. In his said cross-complaint, which was sworn to by himself, he admitted the allegation that \$225 was a reasonable attorney's fee to be allowed in the foreclosure proceeding brought by the Farmers Savings Bank above mentioned. He also alleged that \$1,500 was a reasonable attorney's fee to be allowed for the foreclosure of his own mortgage. In the decree and judgment an allowance of \$225 was made as an attorney's fee in the case of the Farmers Savings Bank, and \$1,500 for the foreclosure of respondent's mortgage. It appears, however, that in paying the judgment, defendant paid only \$221.33 as an attorney's fee in the Savings Bank foreclosure.

The motion for new trial was based on the following grounds: "1. Insufficiency of the evidence to justify the verdict. 2. That the verdict is against law. 3. Error in law occurring at the trial and excepted to at the time by the party making application." The denial of this motion by the trial court is assigned as error. We think the motion should have been sustained on all of the grounds mentioned. It was claimed by respondent that appellant had little or no responsibility in the foreclosure proceeding as his own attorney looked after the matter. To meet this, appellant offered evidence to show that his client had in no wise released him from responsibility in the matter. If respondent had the right to question the value of appellant's services in this manner (a question we are not now called upon to decide), then appellant had the right to meet this by showing that he had in no manner been released from responsibility to his client as his attorney of record in the case.

Upon the trial defendant offered, and over the objection of plaintiff was permitted, to introduce evidence tending to show that \$225 was an excessive charge to be made as an attorney's fee in the foreclosure proceeding mentioned. It is contended

that this evidence was not admissible. We think the contention must be upheld. We do not think it tends to prove the truth of any alleged libelous statement made in the published article complained of. The allowance of an attorney fee to the Farmers Savings Bank in the foreclosure proceeding was not an allowance to this appellant. The latter was the attorney in the case, but that does not mean that the allowance was to him. The judgment awarded him nothing. The allowance was to his client. What the latter may have paid him for his services may have been more or may have been less than the amount allowed by the decree, and is a matter that has no bearing upon the issues involved herein. Even if appellant be regarded as a party to whom that part of the judgment was awarded, then the evidence would be inadmissible for the reason that said judgment would then be *res adjudicata* as to the amount of the attorney fee.

Our statute defines libel as follows:

"A libel is the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any defamation, made public as aforesaid, designed to blacken and villify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. . . ."
Bal. Code, § 7087 (P. C. § 1856).

Under this statute it will be seen that many of the statements in said publications were libelous, if untrue. The burden of proving the truth of such statement was upon the defendant. As to the truth of some of these statements which are libelous *per se*, there is no evidence. When the owner or manager of a newspaper has a difficulty with another person and makes, in the columns of his newspaper such an attack upon his adversary as we here find, he should be held liable for the damages he thereby occasions, unless he can clearly establish the truthfulness of his otherwise libelous statements. The liberty of the press is important and should be always guaran-

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teed. But the abuse of that liberty is a serious menace to individual rights and happiness, subversive of law and order, and detrimental to the best interests of society and the state. Under the evidence in this case, we think the jury should not only have been instructed concerning the matters as to which there was a conflict in the evidence, but should have been told that there was no evidence as to the truthfulness of some of the libelous statements made, and that appellant was entitled to a verdict for such damages, if any, as had been occasioned by that portion of the libelous statements as to the truth of which there was no evidence, as well as for those occasioned by any other of the libelous statements which they should find not to be proven truthful by a fair preponderance of the evidence.

The judgment of the honorable superior court is reversed, and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, RUDKIN, and MOUNT, JJ., concur.

[No. 6610. Decided July 8, 1907.]

JAMES J. ANDERSON *et al.*, *Respondents*, v. GEORGE LAWLER,
Appellant.¹

BROKERS—AUTHORITY—BREACH OF DUTY—SPECIFIC PERFORMANCE.
Where a real estate broker was employed by the owner of land to effect a sale, a contract in the form of a receipt to the agent for earnest money, intending a sale to a third party, gives the agent no personal interest which he could enforce in his own favor.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 20, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury in an action to quiet title. Affirmed.

¹Reported in 90 Pac. 913.

F. S. Blattner and Frank H. Kelley, for appellant.

Hudson & Holt and H. P. Burdick, for respondents.

MOUNT, J.—This action was brought by the respondents to remove a cloud from the title of certain real estate. It was alleged in the complaint that the cloud consisted of a contract in the form of a receipt, signed by respondent James J. Anderson, acknowledging the payment of \$100 as earnest money from appellant for the purchase of the land in question, the receipt stating that, on the payment of \$6,090 additional, the respondent James J. Anderson would sell and convey the property to appellant or his assigns; that this contract was void for the reason that the property was community property of respondents at the time the receipt was given and that Mrs. Anderson had not consented to the sale, and for the further reason that the contract was procured through misrepresentations and fraud, and that appellant had placed the same of record in Pierce county where the land was located, and the said receipt thereby became a cloud upon respondents' title. The complaint alleged a tender back of \$100, and prayed for the cancellation of the contract and the removal of the cloud. Appellant answered, denying generally all the allegations of the complaint except the execution of the contract, and then alleged affirmatively, by way of cross-complaint, that respondent James Anderson was the owner of the land and entered into the contract with appellant; that the contract was fully complied with on the part of the appellant; and the prayer was for specific performance or for damages.

At the trial of the case to the court without a jury, upon the merits, the court found that the property described was community property of James J. Anderson and wife at the time the receipt or contract of sale was entered into, and that Mrs. Anderson had not consented to the same; and also found that the appellant was engaged in the real estate business at the time the contract was made, and that the appellant was acting as the agent of respondent James J. Anderson, and

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caused his principal to believe that the contract for sale was to a third person as purchaser and not to the appellant; that appellant's conduct in this respect was a breach of duty to his principal, and was therefore void; that inasmuch as the contract had been recorded in the auditor's office, it cast a cloud upon the title of the real estate. A judgment was entered as prayed for in the complaint. The appeal is prosecuted from that judgment.

The principal question of fact at issue upon the trial was whether the appellant was himself the purchaser. It was apparently conceded that he had, previous to the date of the contract, been employed as agent by Mr. Anderson to sell the property. The evidence was in conflict in regard to the fact of sale by the principal to the agent. After a careful examination of the record, we find sufficient evidence to support the findings of the court to the effect that the respondent James J. Anderson did not intend a sale to his agent, but intended a sale to some third person, which was never made, and that the agent therefore acquired no personal interest in the contract or in the property which he could enforce in his own favor. It is therefore unnecessary to pass upon other questions presented.

The judgment of the trial court must be affirmed.

HADLEY, C. J., FULLERTON, ROOT, and CROW, JJ., concur.

[No. 6632. Decided July 8, 1907.]

PETER F. KLINE *et al.*, *Appellants*, v. HENRY W. STEIN *et al.*
Respondents.¹

JUDGMENT—RES JUDICATA—IDENTITY OF CAUSES—ACTIONS—SPLITTING CAUSES—REMEDY FOR MISTAKE. Judgment in an action of ejectment awarding plaintiff the possession of premises along a disputed boundary line, by reason of title by adverse possession, is *res judicata* in a subsequent suit between the same parties to recover an additional strip claimed to have been omitted by mistake from the former complaint, where plaintiff was dispossessed of both tracts by one forcible trespass by the defendant and the same evidence would be required to support both actions; as the plaintiff cannot thus split up his cause of action, and any remedy for the mistake in the first complaint would be by a proceeding to open the former judgment.

Appeal from a judgment of the superior court for Kitsap county, Frater, J., entered September 17, 1906, upon sustaining a motion for judgment on the pleadings, dismissing an action of ejectment. Affirmed.

Thomas Carroll, John Arthur, and C. D. Sutton, for appellants.

Charles E. Patterson and Frank T. Reid, for respondents.

FULLERTON, J.—This is an action of ejectment, brought by the appellants against the respondents to recover some three acres of land. To the complaint in ejectment, an answer was filed, pleading former adjudication, and to this answer the appellants filed a reply. On the filing of the reply, the respondents moved for a judgment on the pleadings, which motion the trial court granted, entering a judgment of dismissal. This appeal is from the judgment so entered.

The facts shown by the pleadings upon which the judgment of dismissal was based are in substance these: In 1884 the appellants entered, under the homestead laws of the United States, with other lands, the east half of the northwest quarter

¹Reported in 90 Pac. 1041.

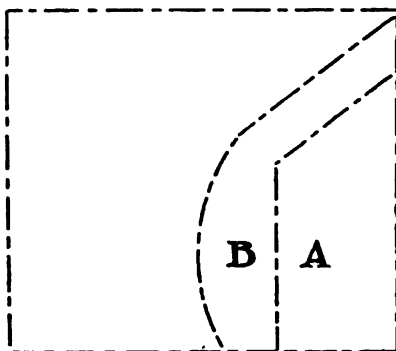
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of section 12, in township 22, north, of range 1, east of the Willamette Meridian, which lands were afterwards conveyed to them by patent from the United States. The predecessors in interest of the respondents acquired, at about the same time, in the same manner, the west half of the quarter section described. In making their settlement upon the land entered by them, the appellants included in their improvements a part of the west half of the quarter section patented to the predecessors in interest of the respondents. After the respondents acquired their rights in the property, they caused the line dividing the tracts to be surveyed, and finding that the appellants had encroached upon the lands described in their patent, entered with force and moved the fences erected by the appellants back to a place which they conceived to be the true line. The appellants thereupon began an action to recover possession of the tract from which they were thus forcibly dispossessed, claiming title thereto by virtue of the statutes relating to adverse possession. The action was prosecuted to judgment and the appellants recovered therein all of the land of which they alleged they were dispossessed by the acts of the respondents. The cause was appealed to this court, where the judgment was affirmed and remanded for execution. The respondents thereupon paid the costs and damages adjudged against them, and performed the mandatory part of the judgment by moving the fence onto the line the judgment determined marked the boundary between the two several tracts.

Thereafter the present action was instituted. In it the appellants seek to recover an irregular shaped tract bordering on the west side of the tract recovered in the first action, which they claim they were deprived of by the same acts of forcible trespass committed by the respondents that deprived them of the land recovered in the former action, and which was not recovered in that action owing to the fact that by accident and mistake on their part it was not included in the complaint filed in that action. The tract recovered in the former action, and the tract sought to be recovered in this action, are roughly

shown on the following diagram, the tract recovered being the tract marked A, and the tract sought to be recovered being the tract marked B. (The square representing the southwest quarter of the northwest quarter of section 12, in township 22, north, of range 1, east of the Willamette Meridian).



The trial judge sustained the motion for judgment on the principle of *res judicata*, and we are clearly of the opinion that he was right in so doing. The trespass gave rise to but one right of recovery, and since the appellants have exercised that right they are estopped from maintaining a second recovery. The appellants, however, seek to distinguish this action from the earlier one by saying that the tract of land they are now seeking to recover is a separate and distinct tract from that first recovered. But manifestly this is a mistaken contention. If they ever were in possession of this tract at all they were deprived of such possession by the same trespass that deprived them of the tract already recovered, and they must resort to the same evidence to maintain their claim to this property that they resorted to in order to maintain their claim to the other, the only possible difference being that they must now contend that their possession covered a larger area than they contended for in the other action. But this difference does not allow the claim that the two suits represent different causes of action. On the contrary, there ha

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been a splitting of a single cause of action. If this action can be maintained, there is no end to the number of actions that may be maintained for this trespass. The appellants can, as soon as judgment is finally entered in this action, maintain another action to recover another parcel of the same tract, and so on indefinitely. It is the policy of the law that there be an end to litigation; and as a means to this end the law requires causes of action to be prosecuted as a whole, and forbids dividing them into parts and prosecuting each part severally.

But the appellants assert that the allegation to the effect that this tract was left out of their original complaint through accident and mistake was made advisedly, and inasmuch as the respondents' motion for judgment on the pleadings concedes it to be true, this fact alone is sufficient to show the inconclusiveness of the original judgment. This contention, also, mistakes the rule. If the appellants have, by accident or mistake on their part, failed to recover all of the land that they were entitled to recover, their remedy is not to sue for the omitted portion, but is rather to seek relief in the original action by opening up the judgment, amending their pleadings, and trying anew their rights to the property.

The judgment of the trial court is right and must be affirmed. It is so ordered.

HADLEY, C. J., MOUNT, ROOT, and CROW, JJ., concur.

[No. 6745. Decided July 8, 1907.]

CLARENCE CUNNINGHAM, *Appellant*, v. WATSON ALLEN.
Respondent.¹

SALES—CONTRACT—QUANTITY—CONSTRUCTION—ACCEPTANCE—SUFFICIENCY OF EVIDENCE. The evidence is insufficient to show an entire sale of a quantity of coal, where it appears that, after negotiations for its sale at \$10 per ton, at which no definite agreement was made, the vendee directed his foreman to take what he needed; that the foreman, after taking some, ordered a barge load to be delivered by a carrier; that the vendor, learning thereof, sent notice by the carrier that if any was taken all must be taken, but the foreman refused to accept the coal on that condition and ordered it returned; that the carrier thereupon unloaded the coal, saying he thought it would be all right, and subsequently the foreman took more of it.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 7, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Philip Tindall, for appellant.

Ballinger, Ronald, Battle & Tennant, for respondent.

FULLERTON, J.—In this action the appellant sought to recover from the respondent the sum of \$720, being, as he alleged, the purchase price of 72 tons of coal which he had theretofore sold and delivered to the respondent. The respondent denied that he had purchased or received the entire 72 tons, but admitted that the appellant had sold and delivered to him 39 8-13 tons at the agreed price of \$396.15, and this sum, with interest, and the costs of action accrued up to the time he filed his answer, he brought into court and tendered to the appellant. The trial, which was had before the court without a jury, resulted in a judgment in favor of the appellant for the amount tendered, and against him for

¹Reported in 90 Pac. 920.

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the costs accrued subsequent to the time the tender was made.

From the record it appears that, in the summer of 1904, the appellant shipped from Vancouver, British Columbia, to Catalla, Alaska, some 72 tons of coal which he intended to use in certain mining operations which he was conducting at that place. The coal was piled in part upon the beach, and in part upon a wharf erected some 600 or 800 feet out from the beach. Later on the appellant discovered that he would not need the coal, and offered to sell the same to the respondent, who was also conducting mining operations near the place where the coal was stored, both parties being then in the city of Seattle. As to what occurred at this meeting the parties do not agree. The appellant insists that he told the respondent the exact quantity of coal he had at Catalla, that part of it was on the beach and part on the wharf, the price per ton for which he would sell it, and that if the respondent desired to purchase he must take the entire quantity, as he would not sell it in lots. The respondent testified that the appellant was not quite so specific. He says the appellant made no mention at all of the coal on the beach, nor did he say that he would not part with any of it unless all of it was taken; that the appellant simply told him that he had coal there, and that the respondent might have it at ten dollars per ton. He testified further that he did not know there was any coal on the beach until after the appellant had presented him with a bill for the coal, charging him with having purchased 72 tons. Both parties, however, agree that no definite bargain was made at this meeting. Shortly thereafter the respondent went north and while there saw the coal that was on the wharf. He told his foreman that the coal was for sale and that the foreman could take such of it as he needed for use at the place where the mining operations were being conducted. After he returned to Seattle he again met the appellant at the wharf just as the appellant was starting north. The matter of the sale of the coal was again taken up, when the respondent told the appellant that he had left the matter

in the hands of his foreman, and that any contract he made with him would be satisfactory.

Before the appellant reached Alaska the respondent's foreman had taken small quantities of the coal at two different times, and had directed a Captain Gray, who was operating a small boat as a common carrier, to bring a barge load from the wharf to the mining works. When the appellant learned of this he directed the carrier to tell the foreman that he wanted it distinctly understood that if any of the coal was taken it must be all taken, that on the beach as well as that on the wharf. The carrier took the barge to the place of delivery and proceeded to unload it. After he had put off about one-third of the load he delivered his message. The foreman immediately ordered the unloading to cease, saying he could not take the coal on those terms, and unless the carrier could not deliver it without condition he must take the coal back to the wharf. After thinking the matter over for a few moments the carrier unloaded the balance, saying that he guessed it would be all right. Later on the respondent took all the balance of the coal left on the wharf, making the whole amount taken some 39 8-13 tons, the amount he tendered payment for after this action was brought.

The appellant contends that the dealings between the parties amounted to a contract on the part of the respondent to take the entire 72 tons, at \$10 per ton, and that he is entitled to judgment for the amount sued for with costs. But we think the facts do not warrant that conclusion. Clearly there was no express agreement to that effect, as no contract at all was made with the respondent himself, and his agent expressly refused to enter into such an agreement when the matter was broached to him. Nor was the agreement implied by the conduct of the parties. Had a part of the coal been taken by the respondent after the condition the appellant sought to impose had been made known to him, in seeming acquiescence in the condition, then perhaps the law would imply an agreement to pay for the entire quantity at the price fixed. But

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Statement of Case.

the delivery was not accepted on the condition the appellant sought to impose. On the contrary, the respondent's agent, to whom the condition was stated, positively refused to accept the coal subject to the condition. Doubtless his receiving the coal in the manner he did receive it, raised an implied obligation to pay, for the amount actually received, such sum as it was then reasonably worth at the place from which it was taken, but it raised no obligation to pay for coal other than that actually received. As the appellant does not question that the amount tendered into court was the reasonable value of the coal taken, it must be accepted as being its reasonable value.

The judgment of the trial court therefore was right and must be affirmed. It is so ordered.

HADLEY, C. J., MOUNT, ROOT, and CROW, JJ., concur.

[No. 6075. Decided July 8, 1907.]

THOMAS W. PROSCH *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.¹

NEW TRIAL—GROUNDS—EXCESSIVE VERDICT. It is not an abuse of discretion to grant a new trial where the jury rendered a manifestly excessive verdict, although an offer was made to remit a portion of the sum.

APPEAL—REVIEW—PRESUMPTIONS—NEW TRIAL. Where a new trial may have been granted on one of several grounds, the order will not be reversed if within the discretion of the court upon any grounds.

Appeal from an order of the superior court for King county, Morris, J., entered June 13, 1906, granting a new trial, after a verdict of the jury rendered in favor of the plaintiffs, in an action for damages to a house caused by the negligent grading of a street. Affirmed.

¹Reported in 90 Pac. 920.

Aubrey Levy and Blaine, Tucker & Hyland, for appellants.
Scott Calhoun and Elmer E. Todd, for respondent.

HADLEY, C. J.—This suit was brought to recover damages to a house, occasioned by the negligent manner of grading a street by the city of Seattle. The grade as made required a cut of considerable depth in front of the plaintiffs' lot upon which the house stood. This cut resulted in a sliding or moving downward of the surface of the lot, which caused the building to topple over and fall. It is the theory of the plaintiffs that the city was negligent in the manner it did the work, and that the damage was the direct result of such negligence. The city denies negligence. The cause was tried before a jury, and a verdict was returned for the plaintiffs in the sum of \$589. The city moved for a new trial, which was granted, and from an order granting a new trial the plaintiffs have appealed.

There is nothing contained in the order granting the new trial which shows upon what ground it was granted, unless it may be inferred from the following sentence at the conclusion of the order: "The said plaintiffs in open court waive any and all sums upon said verdict in excess of the sum of \$500." The waiver shown by the above quotation was in practical effect an admission on the part of the appellants that the verdict was excessive in amount. That it was such we think is apparent from the record. There was no direct testimony that the value of the injured house was more than \$500, yet the verdict returned was for \$89 in excess of that amount. It is true the appellants appear to have offered to remit the excessive amount, but the testimony as to the full value which formed the basis as to the measure of damages, and also as to the actual damages, was not uniform. The highest estimate was \$500, and in view of all the evidence, a manifestly excessive verdict having been returned, we think it was within the court's discretion to grant a new trial notwithstanding the offer to remit a given amount. It should not be

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held that the order of the court was an abuse of discretion in the particular mentioned, even if that was the sole ground upon which it was made.

What if any other reasons may have actuated the court in the making of its order do not appear. Several statutory grounds were recited in the motion for a new trial. It is established, however, that where the record shows that a motion for new trial was made upon several grounds, but does not show upon what ground the ruling of the court was based, the order granting a new trial will not be reversed if it was within the sound discretion of the court to make the order upon any of the grounds stated. *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 504; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109.

The judgment is affirmed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 6712. Decided July 8, 1907.]

WILLIAM SCHULTZ, *Respondent*, v. SIMMONS FUR COMPANY,
Appellant.¹

CONTRACTS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN—CONSTRUCTION—QUESTION FOR JURY. A letter offering employment to a fur cutter at \$25 a week for the "busy season" and \$20 for the "dull season" is ambiguous, authorizing the admission of oral evidence to explain the terms as used in the fur trade, making the interpretation of the contract a question for the jury.

SAME—TERMS OF CONTRACT. A letter offering employment to a fur cutter, dated October 28, 1905, stating that "I have no doubt that it will be all year round" and ending, "I will give you \$25 a week for six months for the busy season and give you \$20 a week for the dull season," is properly construed by the jury to be a contract of employment for one year, when it is explained by the oral testimony that the six months of the busy season were the following Novem-

¹Reported in 90 Pac. 917.

ber and December of that year, and January, August, September and October of the next year, since in no other way could effect be given to the promise to pay \$25 a week for six months.

CONTRACTS—MUTUALITY—ACCEPTANCE. A letter offering employment for one year is a complete contract as soon as accepted, and there is no lack of mutuality after beginning performance.

APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence will not be disturbed on appeal where there is sufficient evidence to sustain it.

TRIAL—MISCONDUCT OF JURY. A verdict should not be disturbed on account of misconduct of the jury, alleged by two of the jurors, where the same is contradicted by affidavits of seven other jurors.

JUDGMENT—ENTRY—APPEAL—HARMLESS ERROR. Failure to enter judgment against appellant immediately after the rendition of a verdict, and that it was not signed until after denial of a new trial, are mere irregularities, and harmless error when no prejudice appears.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 27, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for breach of a contract of employment. Affirmed.

J. H. Allen and James A. Dougan, for appellant.

Cutts & Dorety, for respondent.

HADLEY, C. J.—This is an action to recover damages for breach of contract. The plaintiff alleged in his complaint that the defendant agreed with him that, if he would remove to Seattle and enter defendant's employment, the latter would employ him for a period of one year as a fur cutter, at a salary of \$25 per week during the months of November and December, 1905, and the months of January, August, September, and October, 1906, and at a salary of \$20 a week during the months from February to July inclusive, in 1906; that in reliance upon such promise and in consideration thereof, the plaintiff immediately left Portland, Oregon, and removed to Seattle, and entered the employment of defendant about November 1, 1905; that the defendant had retained

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plaintiff in said employment and paid him the above-specified salary during the months of November and December, 1905, and until January 27, 1906, when defendant refused to employ him any longer. He alleges that he has done all things necessary to entitle him to demand performance of said contract and to bring this action; that he has demanded that defendant employ him for the balance of said contract time, which demand was refused. He alleges impossibility to procure other employment, and fixes his damages by reason of defendant's alleged breach of its contract at \$845. The answer admits that defendant employed plaintiff, and alleges that the agreement was to pay him \$25 weekly during the busy season and \$20 weekly during the dull season of the fur trade, but denies that the employment was for a year. It is further alleged that the plaintiff was an incompetent workman; that he was intemperate and irregular in his habits, and that the defendant could not depend upon him to be present when his services were required by his employment; that the defendant would have discharged him but for the fact that plaintiff himself abandoned his said employment of his own accord. These affirmative allegations were in the main denied by the reply. Upon the above issues the cause was tried before a jury, and a verdict was returned for plaintiff in the sum of \$615. Judgment was entered for the amount. Defendant's motion for new trial was denied, and it has appealed.

Many specific assignments of error are set forth in the brief, which involve the single matter of the nature of the agreement between the parties. The chief propositions discussed by appellant are stated in its argument in its brief as follows:

"Was there any contract between the plaintiff and the defendant? If there was a contract, was it such a contract as was enforceable against the defendant? If there was an enforceable contract, was it such a contract as should have been in writing to satisfy the requirements of the statute of frauds? And if the contract should have been in writing to satisfy the statute, should an oral statement have been admitted to ex-

plain, alter or add to the terms of the written contract, if any there was?"

These questions arose under the denial of appellant's motion for a nonsuit and its challenge to the sufficiency of the evidence. Under our views of the case, we need not argue all the points discussed in the briefs, for the reason that we think there was a written contract between the parties. Respondent, in answer to interrogatories propounded to him before the trial, answered that he based his right to recover upon a letter from appellant, of which the following is a copy:

"Seattle, Wash., Oct. 28, 1905.

"Wm. Schultz, Dear Sir.—I received your letter and was very sorry to hear that you were sick, and hoping this letter will find you in the best of health. In reference to work, I wish to state that Glandzman cannot do the work satisfactory for me, and as you have written to me before that you do not like your position, I wish you would come up and work for me rather than work elsewhere. As I have to have a man to do all my work, I have no doubt but what it will be all year round. I have told you when you were here, that no doubt that there was a better opening here than elsewhere. I hope you will make up your mind and come at once. In reference to the wages I will give you \$25.00 a week for six months for the busy season, and give you \$20.00 a week for the dull season. Hoping to see you Monday morning here I remain,

Yours,

"Simmons Fur Co."

The letter was introduced in evidence at the trial, and appellant contends that it does not amount to a contract for want of mutuality, and moreover that it is indefinite in its terms as to the time of employment. It is also urged that the court erred in admitting oral evidence touching the contract, inasmuch as respondent claims that the contract was in writing. Respondent, upon the other hand, takes the position that by his acceptance of the terms stated in the letter by his entering upon the performance thereof, the contract became mutual and both parties became bound thereunder. He also contends that the contract is sufficiently clear upon its face

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to show an employment for one year, and that it should have been so construed by the court; but further contends that, if it is ambiguous or doubtful, then the oral testimony was properly admitted, not to vary the terms of the written contract but to explain and make clear wherein it is ambiguous. We adopt the latter view in harmony with the trial court's ruling, and we believe there was sufficient ambiguity of expression in the use of certain words and terms to make the meaning of the contract doubtful, at least to one not familiar with the customs of the branch of the fur trade concerned.

Respondent argues that the expression "I have no doubt but what it will be all year round," must be literally construed as meaning the absence of *all* doubt; therefore a certainty, an absolute agreement for one year. It must be conceded that a strict literal reading would seem to indicate such meaning, but appellant argues that the expression contains within itself a reservation of *some* doubt, and such may be true when viewed not so much with reference to the actual words employed as in respect to a provincial or possibly general usage and understanding of the words in similar connections. In view of the latter probability, it became necessary to look to other parts of the writing for further light upon the subject of the duration of the contract. Accordingly we find the statement "I will give you \$25 a week for six months for the busy season, and give you \$20 a week for the dull season." The terms "busy season" and "dull season," unexplained as they are in the contract, are ambiguous to those unacquainted with the fur trade. Oral testimony was therefore proper to explain their meaning. The testimony showed that what is called the "busy season" begins on September 1 each year, and extends continuously through the following six months, ending on March 1. The dull season covers the six months from March 1 to September 1. The letter which is the basis of the contract between the parties bears date October 28, 1905. It will therefore be observed that but about four months of the then current busy season remained.

The language of the letter, however, included an unconditional promise to pay \$25 a week "for six months" for the busy season. It will be seen that such six months of busy season necessarily included the November, December, January, and February of the then current busy season, and the September and October of the following busy season. Between the two came the six months of dull season, during which, the letter says, the appellant will pay \$20 a week. Thus, in the light of the explanatory testimony, we think it was proper to submit to the jury whether, from all the language employed in the letter, the terms of which were accepted and acted upon by the respondent, it was the intention to make a contract for one year. The verdict is therefore conclusive that the contract was for one year. The jury doubtless reasoned that the promise to pay \$25 a week for six months of the busy season could not be given force under any other interpretation. It is a general principle of interpretation that a written contract must if possible be so construed as to give effect to all parts of the instrument. Phrases used in the writing will be construed to be effectual rather than otherwise when they may be so construed reasonably, having in view all the surrounding circumstances. 17 Am. & Eng. Ency. Law (2d ed.), 7, and cases there cited.

The contract was not lacking in mutuality. The letter contained an offer which was accepted, and the contract became complete as soon as respondent accepted the benefits of the offer by beginning performance on his part. *Smith v. Ingram*, 90 Ala. 529, 8 South. 144; *Woodbury v. Jones*, 44 N. H. 206. The parol testimony admitted did not vary or contradict the terms of the written instrument, and it was not admitted for that purpose, but to explain, as it did, the meaning of the terms used. It was properly admitted and the interpretation of the contract therefore became a question for the jury in the light of this explanatory evidence. *Stringham v. Davis*, 23 Wash. 568, 63 Pac. 230; *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139; *Carr v. Jones*, 29 Wash. 78, 69

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Pac. 646. The court did not err in its denial of the motion for nonsuit or of the challenge to the evidence.

On the above theory the jury were properly instructed, and we think the instructions were full and fair upon every phase of the case. Upon the defense of incompetence of respondent and that he abandoned the contract, there was much testimony, but there was also disputed testimony. The jury must have found against that defense; and, under the evidence in the record, it is not for us to say that the verdict is not sustained by sufficient evidence. The testimony showed that respondent was able to procure employment during a part of the remaining period covered by the contract, but not for all the time. The amount returned is within the testimony. The affidavits of two jurors alleging prejudice against appellant on the part of the jury and misconduct resulting therefrom are contradicted by affidavits of seven other jurors. We therefore find in the record no sufficient reason for disturbing the verdict.

The appellant asks a reversal upon the ground that the judgment was not entered by the clerk immediately after the verdict, but that it was signed by the judge after the motion for new trial was denied. The case of *Harris v. Fidalgo Mill Co.*, 38 Wash. 169, 80 Pac. 289, is cited upon this point. In that case the court stated that no attempt had been made to vacate the judgment, and the appellant here urges that it has put itself in position to meet that point by moving in the court below to vacate this judgment. Reference to the former opinion will, however, show that the decision upon the point was not based upon the one ground of failure to move for vacation. That matter was mentioned merely incidentally. The opinion stated that such matters are largely directory; that the record showed that the judgment was a formal one, signed by the judge and filed by the clerk. Such is the judgment here. There is no showing that appellant was in any way prejudiced by the entry of the judgment at the time it was entered. This court held, in *Brown v. Porter*, 7 Wash. 327,

34 Pac. 1105, that judgments are not void merely because they may not be entered within the time limited by law. That case was also cited approvingly in *Harris v. Fidalgo Mill Co.*, *supra*. The entry of the judgment at the time it was made was no more than an irregularity, and since it is not shown to have in any way affected a substantial right of appellant, it should not be reversed on that ground alone.

The judgment is affirmed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 6668. Decided July 9, 1907.]

A. G. PRICHARD, TRUSTEE, *Respondent*, v. RUTHER JACOBS
et al., *Appellants*.¹

INDIANS—LANDS—ALLOTMENTS—SALE OF LANDS—STATUTES—CONSTRUCTION. Under the act of Congress authorizing a commission to sell lands allotted to the Puyallup Indians, and held by them under restrictions against alienation, the written consent to such a sale required to be given by an allottee, is not revoked by his death, but finally authorizes a sale without further consent of heirs; especially as the Interior Department has so construed the law, and no reason exists for departing from such construction.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered August 4, 1906, upon findings in favor of the plaintiff, upon an agreed statement of facts, in an action to quiet title. Affirmed.

Ira A. Town and *E. D. Wilcox*, for appellants.

Ellis & Fletcher, for respondent.

HADLEY, C. J.—This is a suit to quiet title to land. All the defendants made default except Ruther Jacobs and Lillie Jacobs, and E. D. Wilcox as their guardian. The cause was

¹Reported in 90 Pac. 922.

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tried upon an agreed statement of facts, from which we gather the following extended and somewhat complicated chain of facts: The land lies in the Puyallup Indian reservation, and was allotted or patented by the United States, on the 30th day of January, 1886, to Charley Jacobs, the head of a family, and to other members thereof, who will be hereinafter mentioned. These were all Puyallup Indians, and said allotment or patent was subject to the stipulations and conditions contained in article 6 of the treaty of the United States with the Omaha Indians. That provision empowered the president to cause allotments to be made from reserved lands to such Indians as were willing to avail themselves of the privilege, and who would locate on the same as a permanent home. On March 3, 1893, Congress passed an act empowering the president to appoint a commission of three persons, and defined the duties of the commission, which, among other things, were to select and appraise such portions of the allotted lands as were not required for homes for the Indian allottees, to sell the same for the benefit of the allottees at public auction after due notice, to superintend the sales, ascertain who are the true owners of the allotted lands, make deeds to the purchasers subject to the approval of the secretary of the interior, the amount received for the lands to be placed in the treasury to the credit of the Indian entitled thereto, the same to be paid to him in such sums and at such times as the commissioner of Indian affairs, with the approval of the secretary of the interior, shall direct. No part of the allotted lands shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell the land and to make a deed to the purchaser thereof, the deeds not to be valid until approved by the secretary of the interior who is directed to make all necessary regulations to carry out said provisions.

On November 6, 1893, the department of the interior instructed the commissioners, who were appointed in pursuance

of the act of Congress aforesaid, to appraise the allotted lands not required for homes for the Indians, to obtain written agreements from the allottees consenting to the sale of lands at sums not less than the appraiser's value, and appointing and constituting the commissioners trustees to sell the lands and make deeds to purchasers, to determine according to the laws of the state of Washington the legal heirs of allottees or heads of families who have died since the issuance of patents for lands selected and appraised for sale, to have guardians appointed for the minor heirs of deceased allottees, and to obtain the consent of the heirs of twenty-one years and of such guardians. The commissioners were instructed to report to the department of the interior for approval, and that upon approval further instructions would be given appertaining to the sale of the lands and making deeds to the purchasers. In 1895 the commissioners received further instructions, among other things to the effect, that they were not required to go into the state courts in order to determine who are the heirs of these allottees, but that they themselves should apply the rule prescribed in their instructions, and when the heir or true owner is so ascertained they should obtain his consent to the sale of his allotment; that the president has the right to prescribe rules for the descent of these lands; that the president speaks and acts through the heads of the several departments in relation to the subjects which appertain to their respective duties; that the secretary of the interior is the officer charged by law with the management and control of Indian affairs; that the allottees are still the wards of the nation, and the secretary of the interior is the officer charged by law with the duties of guardianship.

Under date of July 2, 1897, the department of the interior notified Clinton A. Snowdon that he had been appointed commissioner of lands of the Indian reservation, under the act of June 7, 1897. This act was practically in all respects similar to the act of March 3, 1893, except that it provided for one commissioner instead of three. At the same time the in-

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terior department gave him instructions, among other things, as follows:

"It will be your duty to sell or offer for sale under previous instructions to the commission, the unsold allotted lands whose appraisements have been approved and sale authorized, and to obtain the written consents of sale, if possible to do so, of other Indian allottees and the members of their families. . . . When such schedules, written consents and appraisals shall have been received, they will be laid before the secretary of the interior for his consideration and approval. Upon approval of the appraisements and authorization of the sale of the lands you will be instructed to sell the same. . . . That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is necessary to obtain the written consent of all the members of the family named in the patent. That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

The allottees named in the patent for the lands in controversy, and their relation to each other, were as follows: Charley Jacobs, the head of the family; Julia, his wife; Annie, his sister; Frank, his son by a former marriage, and Oscar, his son by his wife Julia. The answering defendants, Lillie and Ruther Jacobs, are the children of said Charley and Julia, and were born after the issuance of the patent, Lillie in the year 1888, and Ruther in 1891. There is also living Sam Johnny, a son of Julia by a former husband, not named in the patent. Annie, named in the patent, died in the month of November, 1888, never having been married, leaving no father, mother, children, brothers, or sisters, except Charley Jacobs, who was her sole heir. On the 7th day of March, 1898, Charley, Julia, and Frank, all of age and named in the patent, subscribed and acknowledged a written consent to

Commissioner Snowdon, appointing him trustee to sell the lands in controversy here, under the act of March 3, 1893. On August 29, 1898, Charley Jacobs, as guardian of Oscar Jacobs, named in the patent, having been previously duly appointed such guardian, signed and acknowledged a similar consent, and on October 7, 1898, he, as sole heir of Annie, named in the patent, signed and acknowledged a similar consent. These consents with the appraisement and other papers were then transmitted by Mr. Snowdon to the secretary of the interior, and were by the latter approved February 20, 1899. On February 27, 1901, Mr. Snowdon offered the premises for sale at public auction, and they were purchased by the plaintiff in this action, for \$1,250, he paying \$420 in cash, the remainder to be paid in five equal payments, to wit, on or before February 27 in each of the next succeeding five years, with interest at six per cent per annum. Mr. Snowdon then executed and delivered to this plaintiff as such purchaser a deed for the land. The deed recited that it should operate as a complete conveyance of the land upon full payment of the purchase money, the terms for payment being also specified. Prior to the commencement of this suit, the plaintiff paid to the proper United States authorities all the payments agreed upon in said commissioner's deed, and the same have been received and accepted by the interior department for distribution to those entitled to the same.

Prior to the making of said sale and conveyance, said Charley Jacobs died, on January 26, 1900, and left surviving him his wife, Julia, his sons Frank and Oscar, all named in the patent; also his daughter Lillie, and his son Ruther, both of whom were born after the patent was issued and were, of course, not named in the patent; and also the said son of Julia by a former husband, Sam Johnny, not named in the patent. The death of Charley was reported to the commissioner of Indian affairs by Mr. Snowdon on May 1, 1900. Julia also died about September 30, 1900. On February 6, 1901, the defendant Wilcox was duly appointed guard-

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ian of Lillie and Ruther. After the deaths aforesaid and before the sale was made, the secretary of the interior, on January 18, 1901, in answer to an inquiry from Mr. Snowdon, the Indian commissioner, as to the status of a case where the original allottee, after consenting to the sale, had died leaving heirs who had not given consent, instructed the commissioner among other things as follows:

"Where allottees and true owners of Puyallup lands have executed their consents of sale, the same having been approved by the secretary, it has been the practice of the department to continue the sale of the lands covered thereby in the case of the death of an allottee or true owner and to distribute the funds arising from such sale to his or her heirs. The office and the department have regarded these written consents as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. . . . These lands are sold under the provisions of the Act of Congress, March 3, 1893, and not under the laws of the state of Washington. . . . It is for the department to pass upon the sufficiency of consents and not the courts of the state of Washington."

The defendant Wilcox, in his various reports as guardian, has reported that the land in question was sold by the Indian commissioner, and that he as guardian has received from the United States, as the proceeds of such sale, a portion of the shares allotted by the secretary of the interior to his wards, as heirs of said deceased persons. The said guardian, however, did not know at the time he received the money that the sale was made by the commissioner after the death of Charley and Julia. When he discovered that fact he refused to accept any further money from the United States as the proceeds of such sale, and prior to the trial of this action the return of the money so received was tendered to the plaintiff, and was by him refused. At the time the plaintiff purchased the premises he had not been advised of the death of Charley and Julia, and at no time until a short time before bringing this action did

he acquire such knowledge or learn of the existence of Lillie or Ruther, or that any one, other than those named in the patent and whose consents for sale had been duly given, claimed any interest in the land. He purchased the land in good faith and relied upon the representations of the commissioner and in full belief of the regularity of his proceedings. The price paid was the full value of the land at the time of the sale, but at the time this suit was brought it was worth, and is now worth, \$25,000.

The above facts were submitted to the department of the interior for a decision and interpretation and, among other things, that department, in February, 1906, held and announced as follows:

"The office and the department have uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust, to be carried out in case of his death, for the benefit of his legal heirs. The Puyallup Commission was made a trustee by the respective written consents executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract, whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner. The provisions of the Puyallup Act (*supra*) appear to be sufficient to justify the course which the department has taken in this matter, to which special attention is invited, and to convey good title to lands sold thereunder."

Upon all the foregoing facts the court held that the plaintiff is the owner in fee simple of the premises in controversy; that the defendants have no interest therein, and that plaintiff's title should be quieted. Decree was entered accordingly, and Lillie and Ruther Jacobs and their guardian Wilcox, being the only answering defendants, have appealed.

The appellants to some extent discuss the nature of the estate taken by the grantees of the patent from the United States. Respondent concedes that they took a base or quali-

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fied fee simple title subject to temporary restrictions on the right of alienation, as held by this court concerning a similar patent in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9. It is also conceded that the appellants, as heirs of the deceased allottees, are entitled to their proportionate part of the proceeds of the sale. The essential question for determination is, what was the nature and effect of the written consent executed by the allottees and appointing the Indian commissioner to sell the lands in controversy. If that consent was sufficient authority for the sale, then the judgment of the trial court was right, inasmuch as the respondent as purchaser and the Indian commissioner and officers of the interior department in all things appear to have acted in good faith, and no fraud or collusion was practiced. The government was the voluntary donor of these lands, and as such it had the power to place such restrictions upon the grant as it saw fit. *Smythe v. Henry*, 41 Fed. 705; *Eells v. Ross*, 64 Fed. 417. Exercising that power, the patent issued for these lands absolutely prohibited alienation for a longer term than two years. The power to authorize further exercise of the right of alienation was expressly prohibited even to the legislature of the future state, without consent of Congress. The ultimate power to confer the right of full alienation was reserved by the government in the grant itself, which, as we have seen, was made in 1886. In pursuance of this reserved power, Congress afterwards passed the aforesaid act of 1893, conferring the full power of alienation and prescribing the method of its exercise.

As we understand the facts in this case, the method of alienation prescribed by Congress has been pursued, unless by reason of the death of Charley and Julia Jacobs, the conveyance was ineffectual. The initiatory step toward alienation prescribed by the act of Congress was the written consent of the allottees. With that existing, the further details of conveyances rested with the Indian commissioner and department of the interior as prescribed. As we have seen, the written consent of all the allottees named in this patent was duly executed and delivered to the commissioner. Annie, the sister

of Charley, had died before the consent was given, but Charley as her sole heir executed the consent.

It is argued by appellants that the written consent had no further force than that of an ordinary naked power of attorney, and that inasmuch as Charley and Julia died after the consent was given and before the sale was made, the power was thereby annulled and the sale rendered void. The words "power of attorney" are not used in the act of Congress prescribing this method of alienation. The office of a power of attorney is well understood. If a mere power revocable at will or by death was what was intended, it would seem that the agreement for alienation would have been so defined. We think it manifest from the act itself that such was not intended. It plainly appears that the government recognized the fact that it had reserved the power to act as trustee for the Indians, so far as alienation was concerned, notwithstanding the allotment in severalty. The statute requires but one consent from an allottee, and it does not in terms require that when an allottee dies after consent is given and before sale, that his heirs must also consent. It empowers the commissioner to procure the appointment of guardians for minor heirs of deceased allottees, but that is manifestly for the purpose of effecting a proper distribution of the proceeds of a sale made in pursuance of a consent once duly given by the allottee himself. We think the consent intended by the act of Congress is in the nature of a contract to be carried out through the department of the interior for the benefit of the allottee and his heirs. The consent invokes as a finality the exercise of the reserved trust held by the government, and when given it is not revocable by death of the allottee, but continues in force as an incident to the exercise of the power reserved by the patent itself to the government. The government discharges this trust by completing the alienation of the lands as agreed by the allottees, and then distributes the proceeds to the allottees, or their heirs, if the allottees have in the meantime died.

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As a matter of original construction, the act of Congress is easily susceptible of the above interpretation, and to us it seems to be a reasonable interpretation. We have also seen from the recital of the facts considered by the trial court that the department of the interior has in all its dealings with the Indians so construed the law. It is the general rule that, when a statute entrusts the carrying out of its provisions to the executive department, its interpretation by that department will be followed by the courts, unless there are cogent reasons to the contrary.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588.

The above statement embodies in a brief way the substance of the expressions of many courts whose opinions might be cited, and which are cited in respondent's brief. Their citation here, however, seems unnecessary, for the reason that this court has already several times applied the said rule of construction and recognized the wholesomeness thereof. *McSorely v. Hill*, 2 Wash. 638, 27 Pac. 552; *Keane v. Brygger*, 3 Wash. 338, 28 Pac. 653; *Blair v. Brown*, 17 Wash. 570, 50 Pac. 483, 61 Am. St. 927; *State ex rel. Smith v. Ross*, 42 Wash. 439, 85 Pac. 29.

Having in view our own construction as above set forth, and particularly in view of the construction placed upon the statute by the executive department, charged with carrying out its terms, we think the sale made by the Indian commissioner was duly authorized. It follows that the respondent's title should be quieted as against appellants.

The judgment is affirmed.

DUNBAR, RUDKIN, FULLERTON, MOUNT, CROW, and ROOT,
JJ., concur.

[No. 6862. Decided July 10, 1907.]

EMMA SEIGMUND, *Appellant*, v. LOUIS W. SEIGMUND,
Respondent.¹

DIVORCE—GROUNDS—NONSUPPORT. Nonsupport by an able-bodied husband, earning good wages, which were spent for liquor, without any excuse for the neglect, constitutes statutory ground for a divorce.

APPEAL—REVIEW—FINDINGS—DIVORCE. Upon appeal from a judgment denying a divorce, in which the findings bring the plaintiff completely within the provisions of the statute respecting nonsupport, justifying a decree, and there are no findings justifying or excusing the defendant's neglect, or any statement of facts brought up on appeal, the case must be reversed with directions to grant a divorce.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 18, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for divorce. Reversed.

McBurney & Cummings, for appellant.

Root, J.—Plaintiff instituted this action to dissolve the bonds of matrimony existing between herself and defendant, and to secure a decree awarding her the custody and control of their two minor children. Nonsupport was alleged as the basis of the action. The defendant was personally served with summons and complaint, but did not appear. After default, the prosecuting attorney appeared and resisted the action. Findings of fact and conclusions of law were made and signed by the trial judge, and a decree thereupon entered dismissing plaintiff's action. From this decree an appeal is prosecuted.

Among others, the court made the following findings:

"That since the marriage of the plaintiff with the defendant, Louis W. Seigmund, the said defendant, has been at all

¹Reported in 90 Pac. 913.

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Opinion Per Root, J.

times an able-bodied man earning good wages and well able to support and maintain the plaintiff and the said minor children; that at all times during the said marriage defendant has wholly failed and neglected to adequately support and maintain the plaintiff and said minor children; that during the past two years the defendant has contributed nothing whatever to the support of plaintiff and said minor children, excepting a single pair of shoes that he purchased for the said daughter Vila; that much of the time during the past two years said defendant compelled the plaintiff to support him by running and maintaining a lodging and boarding house in the city of Seattle.

"That on or about the first day of April, 1906, defendant wholly deserted plaintiff and said minor children; during the month of June, said year, left the city of Seattle with the intention to not return.

"That the defendant, Louis W. Seigmund, is habitually addicted to the intemperate use of liquor, and frequently while under the influence of liquor, would use toward the plaintiff and in the presence of the minor children, violent and abusive language; that he is a man of vicious habits and has spent his income and always spent his income to satisfy his said appetite for liquor or in vicious and immoral ways."

There were no findings made that justify or excuse the defendant for the neglect of duty and the misconduct shown in the findings recited, and none showing any dereliction on the part of plaintiff. The defendant has not appeared in this court, nor has the state or any one else in support of the judgment rendered. Hence, we do not know the character of the defense interposed, or the theory upon which the trial court decided the case. There is no statement of facts or bill of exceptions, and we do not know what was shown by the evidence and proceedings other than as revealed by the findings. The latter bring the plaintiff completely within the provisions of the statute and justify the prayer of her complaint.

The judgment of the honorable superior court is reversed, and the cause remanded with directions to enter a decree dissolving the bonds of matrimony existing between plaintiff and defendant and awarding to plaintiff the custody, care, and

control of the two minor children. The court shall also in its decree provide for the allowance to the plaintiff, for herself and for the support of the children, of an appropriate sum, if in its judgment such action would be meet and proper in the premises.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 6786. Decided July 10, 1907.]

IN RE PATRICK MURPHY'S ESTATE.

MARY MURPHY, *Respondent*, v. MARY A. NEYLON *et al.*
Appellants.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—DEED—EFFECT OF RECITALS. Recitals in a deed to a husband to the effect that the land was his separate property, do not affect the community character of the land where it was purchased with community funds and the wife was unaware of the recitals.

HOMESTEAD—WIDOW—SELECTION. The widow is entitled to claim a homestead in community land purchased for that purpose and occupied as a home by the deceased at the time of his death, although not previously selected as a homestead.

SAME—ABANDONMENT. A widow is not deprived of her homestead rights by the fact that she was driven therefrom by her husband without cause and not permitted to return, where she never evinced any intention of abandoning the same, and the property constituted the home of the husband at the time of his death.

SAME—ALLOTMENT. Four lots in one tract may be set aside to a widow as a homestead, although there are two houses thereon, one under lease, where the whole tract was purchased for a home, was less than \$1,000 in value, and the evidence as to the value of the buildings is not clear, one appearing to be a mere shack.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered July 9, 1906, upon findings in favor of the plaintiff, granting an application to set aside real property as a homestead. Affirmed.

¹Reported in 90 Pac. 916.

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Opinion Per Crow, J.

Troy & Falknor, for appellants.*Vance & Mitchell*, for respondent.

Crow, J.—Patrick and Mary Murphy were husband and wife from March, 1880, until the death of the husband in December, 1905. On October 6, 1902, Patrick Murphy, for a consideration of \$650, purchased a tract of land consisting of four platted lots in the city of Olympia, with two small buildings located thereon. Claiming that it was purchased with his separate funds he, without the knowledge or consent of his wife, caused the deed to make the following recital: "It is hereby declared that the above described property is purchased by the said Patrick Murphy with money belonging to him as his separate property and not as community property." Patrick Murphy died testate, having executed a will in which he devised the lots to one Nellie Collins, his niece, and made the following declaration: "I declare that I own said described real estate in my own separate right, and that the money by which said lots were purchased was received by me as an inheritance from my brother John Murphy, who died in San Francisco, California, and that my wife Mary Murphy has no community interest whatever in said described lots." The will was admitted to probate, and Michael J. Neylon and Mary A. Neylon were appointed and qualified as executor and executrix. On July 9, 1906, the superior court, on the written application of the widow, entered a decree setting aside all of said real property to her as a homestead. From this decree the executor and executrix have appealed.

After filing her written application, and prior to the decree, the respondent filed in the office of the auditor of Thurston county, Washington, a declaration of homestead on the property. On the hearing the trial court found the following facts: That Patrick Murphy died testate on December 15, 1905, in San Francisco, California, being then a resident of Thurston county, Washington, and having real and personal property situate therein; that his will was admitted to pro-

bate; that letters of administration were issued to Michael J. Neylon and Mary A. Neylon, as executor and executrix; that the family of the deceased consisted of himself and his surviving wife, Mary Murphy; that the value of the real estate is less than \$1,000; that the legal title thereto was acquired in the name of Patrick Murphy; that at the time of its acquisition it was, and continued until the death of Patrick Murphy to be, the community property of himself and wife; that they acquired the property for the purpose and with the intent of making it their home; that during his lifetime neither he nor his wife took any steps to comply with the provisions of the law relative to the acquisition of a homestead other than by living thereon; that the property was the home of Patrick Murphy at the date of his death; that there is no other realty belonging to the estate or the petitioner in which she can claim a homestead, and that since the death of Patrick Murphy she has fully complied with the law relative to the filing on said real estate as a homestead for the benefit of herself as his surviving widow.

The appellants' first contention is that the real estate was the separate property of Patrick Murphy, and that the same having been devised to the testator's niece, no homestead can be granted to the widow therein, citing *Egres v. Baker*, 7 Wash. 291, 34 Pac. 831. We have carefully examined the evidence and are satisfied that it sustains the finding that the realty was not only community property, but was also purchased and used for the home of decedent and respondent. The recitals in the deed were unknown to the respondent at all times prior to the death of Patrick Murphy, and did not destroy the community character of the property conveyed, which had been purchased with community funds. While the evidence shows that Patrick Murphy had inherited some money from a deceased brother, it also establishes the fact that all of such inheritance had been dissipated and consumed prior to the purchase of the lots in question. The declaration in the will was self-serving and did not bind the respondent. The

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real estate was community property, was purchased for a home, and respondent is entitled to claim a homestead therein.

The appellants further contend that, even though the realty was community property and a homestead could be secured therein, the court had no power to set aside all of such realty to respondent, as there were two houses which were under lease, at the death of the testator, not occupied as a homestead, and that the buildings are separated by a partition fence. The evidence shows that the respondent and decedent actually occupied one of the houses as a home until the decedent, by abuse and cruelty, drove the respondent therefrom; that he never permitted her to again live with him; that his conduct was without just cause or excuse, and that when he left the state of Washington he intended to return, but died before doing so. To hold under such circumstances that the respondent can now claim no homestead, and to do so for the sole reason that she was not actually residing on the property as contemplated by Bal. Code, § 5214 (P. C. § 5456), would be to annul the humane purposes of the homestead act, and hold that a husband, by driving his helpless wife from their home, could entirely deprive her of her homestead rights. Respondent did not leave the property voluntarily, nor did she ever evince any intention of abandoning her homestead. It would be a travesty on justice to now hold that she had been deprived of her rights by the inexcusable and cruel conduct of her husband.

The appellants further contend that, in any event, as one of the buildings was leased for the period of almost a year after the death of Patrick Murphy and was separated from the other building by a partition fence, the leased building could not be held as a homestead. There is evidence tending to show that two buildings were on the land, with some sort of a partition fence between. The four lots, however, were all in one tract. They were purchased for a home at one time. The evidence is not clear as to the character or value of the buildings. The smaller one must have been a mere shack. The value of both with the lots was less than \$1,000,

and they had been purchased in 1902 for \$650. From all the evidence relative to the character and value of this property, we are not prepared to hold that the court committed any error in setting aside the entire tract as a homestead.

The appellants have made some contention that the court erred in the matter of the admission and rejection of evidence, but we find no prejudicial error to have been committed in this regard.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 6597. Decided July 10, 1907.]

JOHN U. BROOKMAN *et al.*, Appellants, v. EUGENE W.
DURKEE *et al.*, Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—FUNDS ACQUIRED IN ANOTHER STATE—WHAT LAW GOVERNS. Real property in this state is the separate property of the husband, where it was purchased by him with money acquired by him in trade after marriage while domiciled with his wife in another state under laws making such money his separate property; for to hold the same community property would affect vested rights.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 14, 1906, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to quiet title. Reversed.

Walker & Munn, for appellants, contended, *inter alia*, that to hold the property to be community property would interfere with vested rights. *McGehee*, *Due Process of Law* (1st ed.), pp. 142, 143, 201; *Cooley*, *Const. Lim.* (7th ed.), pp. 508, 549; 4 *Kent*, *Commentaries* (14th ed.), p. 202; *Pearce v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. The purchase for investment was not an

¹Reported in 90 Pac. 914.

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Citations of Counsel.

"acquisition" of property. *Leibes v. Steffy*, 4 Ariz. 11, 32 Pac. 261; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 81.

Frank Allyn, for respondents, to the point that the *lex rei sitae* should govern the acquisition, control, holding, descent and distribution of real property in this state acquired by nonresidents, cited: *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Pratt v. Douglas*, 38 N. J. Eq. 516; *Burnet v. Burnet*, 46 N. J. Eq. 144; *Penny v. Christmas*, 7 Rob. (La.) 48; *Jones v. Gerock*, 59 N. C. (Jones' Eq.) 190; *Mitchell v. Word*, 60 Ga. 525; *Lamar v. Scott*, 3 Strob. (S. C. Law) 562; *Potter v. Titcomb*, 22 Me. 300; *Grimball v. Patton*, 70 Ala. 626; *Apperson v. Bolton*, 29 Ark. 418; *Garland v. Rowan*, 2 Smedes & Mar. (Miss.), 617; *M'Cormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; 2 Scribner, Dower (2d ed.), § 24; Story, Conflict of Laws (8th ed.), §§ 448, 454; *Duncan v. Dick*, Walker (Miss.) 288; *Sneed v. Ewing*, 28 Ky. 460, 22 Am. Dec. 41; Wharton, Conflict of Laws, § 273; Minor, Conflict of Laws, § 80. Our community property, as far as real estate located here is concerned, applies alike to residents and nonresidents. Ballinger, Community Property, pp. 38, 40; *Hershberger v. Blewett*, 46 Fed. 704; *Gratton v. Weber*, 47 Fed. 852; 14 Cyc. 21, and cases cited. The rule of comity is not obligatory and will not be enforced if opposed to the distinctive public policy of the forum. Note to *Rush v. Landers*, 57 L. R. A. 353 (107 La. 549, 32 South. 95). Our community property laws being a substitute for dower, comity does not require their restriction to residents of the state unless the common law states restrict the dower rights to residents of such states. It is the universal doctrine of all common law states, as well as states where dower is given by statute, that the widow's dower is given, not by the law of domicile, but according to the place where the particular land is situated. Wharton, Conflict of Laws, § 273; Story, Conflict of Laws, (8th ed.), § 448; 10 Am. & Eng. Ency. Law (2d ed.), 142;

Minor, Conflict of Laws, § 80; *Nelson v. Bridport*, 8 Bat. (Eng.) 547; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 81. and cases before cited.¹

¹NOTE.—In the case of *Witherill v. Fraunfelter*, *post*, p. 699, 31 Pac. 1086, considered with the present case, *Harold Preston* and *Charles E. Patterson*, for appellants, contended, *inter alia*, that the Federal cases of *Hershberger v. Blewett*, 46 Fed. 704, and *Gratton v. Weber*, 47 Fed. 852, did not decide that separate property of non-residents invested in this state became community property. 6 Am. & Eng. Ency. Law (2d ed.), 352, note 4. The word "acquired" in the statute does not include property purchased with separate funds. *Liebes v. Steffy*, 4 Ariz. 11, 32 Pac. 261; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 81. A community property law taking property from one spouse and giving it to another would be unconstitutional. *Seeber v. Randall*, 102 Fed. 215. Real property purchased with the separate property of nonresidents is not community property. *Kraemer v. Kraemer*, 52 Cal. 302; *In re Burrows Estate*, 136 Cal. 113, 66 Pac. 488; *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732; *McDaniels v. Harley* (Tex. Civ. App.), 42 S. W. 323; *Oliver v. Robertson*, 41 Tex. 422; *Duke v. Reed*, 64 Tex. 705; *Dubois v. Jackson*, 49 Ill. 48; *Tinkler v. Cox*, 68 Ill. 119; *Hanchett v. Rice*, 22 Ill. App. 442; *Cushman v. Monroe, Smaltz & Co.*, 70 Ala. 271; *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93, 101 Am. St. 1016; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862; *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050; *Clarke v. Thayer*, 98 Tex. 142, 81 S. W. 1274; *Blethen v. Bonner*, 93 Tex. 141, 53 S. W. 1016.

E. P. Whiting, for respondent, contended, that the respective rights of husband and wife in real property are determined by the law of the place where the property is situated. *Wharton, Conflict of Laws* (3d ed.), §§ 191, 273, 274; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Schouler, Husband and Wife*, § 570; 1 Washburn, *Real Property*, § 151; *Nelson v. Goree's Admr's*, 34 Ala. 535; *Newcomer v. Orem*, 2 Md. 271, 56 Am. Dec. 717; *Rush v. Landers*, 107 La. 549, 32 South. 95, 57 L. R. A. 353; *Duffy v. White*, 115 Mich. 264, 73 N. W. 363; *McCollum v. Smith*, Meigs (Tenn.) 342, 33 Am. Dec. 147; *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Minor, Conflict of Laws*, § 80; *Story, Conflict of Laws* (8th ed.), § 158. So the widow has dower, not by the law of the place of the marriage or of the domicile, but according to the law of the place where the particular land is situated. 10 Am. & Eng. Ency. Law (2d ed.), p. 142; *Minor, Conflict of Laws*, § 80; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 81; *Jones v. Gerock*, 59 N. C. 19; *Lamar v. Scott*, 3 Strob. L. (S. C.) 562; *Mitchell v. Word*, 60 Ga.

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525; *Apperson v. Bolton*, 29 Ark. 418; *Duncan v. Dick*, Walk. (Miss.) 281; *Burnet v. Burnet*, 46 N. J. Eq. 144. Our first community property, restricted to residents, was changed to apply also to nonresidents. Bal. Code, §§ 4488-4490, 4496 (P. C. §§ 3875, 3867, 3876, 3884); *Hershberger v. Blewett*, 46 Fed. 704; *Gratton v. Weber*, 47 Fed. 852. The California and Texas cases cited arose under statutes expressly limited to residents of those states. *Kraemer v. Kraemer*, 52 Cal. 302; California Act, 1869, §§ 14, 15; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050; Texas Code, § 2975. But in Louisiana where the law is made to apply to nonresidents, property acquired by them is community property. Louisiana Civil Code, art. 2400.—REP.

FULLERTON, J.—In 1849 Eugene R. Durkee, then domiciled and having his residence in the state of New York, intermarried with one Cynthia H. Durkee, and thereafter lived with her as his wife in that state until 1889. In the year last named, Mrs. Durkee died intestate, leaving as her sole heirs-at-law the respondents in this action. During the time the marriage existed, Eugene R. Durkee conducted a manufacturing business in the state of New York, and accumulated as the profits of such business a considerable fortune. In 1888, a year prior to the death of his wife, he used a portion of the fortune so accumulated in the purchase of certain real property situated in Pierce county in this state, and in 1902 died in the state of New York, leaving a will by which he devised the property to the appellants. Neither the husband or wife ever resided or had a domicile in this state. The respondents claim that the real property mentioned was the community property of Eugene and Cynthia Durkee, and that they have an undivided half interest therein as heirs of their mother. The appellants claim that the property was the separate property of Eugene R. Durkee, and that they are the owners of the whole thereof by virtue of the will. At the trial it was conceded that the rules of the common law governed the ownership of personal property acquired by a husband in the course of trade or business in the state of New York, and that money and other personal property accumulated by him in that state, became his sole and separate property subject

to his absolute dominion, and that the wife had no interest therein which would descend to her heirs on her death during the lifetime of her husband. The court held, nevertheless, that the real property purchased in this state during the lifetime of the wife with the funds so accumulated became the community property of the husband and wife, and that the wife's heirs inherited an undivided one-half interest in the property on her death. The correctness of this holding presents the sole question to be determined on this appeal.

The statutes of this state defining separate and community property read as follows:

"Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or incumbrance, as fully and to the same effect as though he were unmarried."

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." Bal. Code, §§ 4488, 4489, and 4490 (P. C. §§ 3875, 3867, 3876).

These statutes, the respondents assert, make no distinction between property acquired within this state and property acquired in another state and brought into this state: but that under these statutes all property acquired after marriage

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by either husband or wife, not acquired by gift, devise or inheritance, or from the rents, issues or profits of property so acquired, whether the same be acquired wholly within this state or in some other state and brought into this state, is community property.

But while the statute broadly construed gives countenance to the contention of the respondents, we cannot think it was the intention of the legislature that no distinction should be made between property acquired wholly within this state by the joint efforts of husband and wife, and property acquired by them elsewhere and brought within this state. If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other, and if the spouse should be the wife it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of such spouse.

While this question has not been directly before this court, analogous cases sustaining the rule can be found. In *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732, certain per-

sonal property had been seized on an execution against the husband for which the community was liable. The wife sought to recover the property seized, on the ground that it was her separate property, having been acquired by her by purchase with money which she acquired in the state of Kansas and brought into this state. The court held the property to be her separate property, saying that the property was her separate property in the state of Kansas and did not change its status by being brought across our state border. In *Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93, 101 Am. St. 1016, it was held that real property purchased in this state by a married woman living with her husband, with money earned by her in Alaska, was her separate property, since the money itself was by the laws of that territory her separate property, and its status in that respect was not changed by being brought into this state. This case is precisely in point and would be controlling were it not for the fact that the decision of the question was not necessary to a decision of the case, as the result must have been the same had the property been determined to be community property. But the case, taken with the case first cited, shows that it has been the uniform opinion of this court since its organization, that property acquired in the manner the property in question here was acquired, is separate property. See, also, *Dormitzer v. German Sav. & Loan Society*, 23 Wash. 132, 62 Pac. 862.

The rule that property acquired in a foreign jurisdiction, which is there the separate property of one of the spouses, maintains its separate character when brought into a state having community property laws, prevails also in California, Texas, and Louisiana. *Kraemer v. Kraemer*, 52 Cal. 302; *In re Burrows' Estate*, 136 Cal. 113, 68 Pac. 488; *Olivier v. Robertson*, 41 Texas 422; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050; *Tanner v. Robert*, 5 Martin (La. N. S.) 255; *Young v. Templeton*, 4 La. Ann. 254.

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Syllabus.

We conclude, therefore, that the property in question was the separate property of Eugene R. Durkee, and passed to the appellants on his death by virtue of the terms of his will.

The judgment is reversed, and the cause remanded with instructions to enter a judgment in accordance with this conclusion.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

[No. 6643. Decided July 15, 1907.]

CLARA E. SYLVESTER *et al.*, *Appellants*, v. THE STATE OF WASHINGTON (*Substituted as defendant for A. B. Allison et al., Defendants*), *Respondent*.¹

EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS OF LAND OFFICE. A certified copy of a notification to the surveyor general of intent to claim land settled upon as a donation claim, from the general land office at Washington, D. C., establishes the date of the giving of such notice, clearly appearing thereon, although the local surveyor general's and register's offices contain no record of the filing thereof.

TERRITORIES—PUBLIC BUILDINGS—DEEDS—GRANTEE. A territory specially authorized to locate and establish the seat of government for which a Federal appropriation was made for the erection of suitable buildings, has power to acquire and hold land for such purpose, and a deed of land therefor is not void for want of a grantee capable of holding the land.

SAME—POWERS—PUBLIC LANDS—GRANTS—STATUTES—CONSTRUCTION. The construction of a congressional authority to a territory to locate and establish the seat of government, with respect to the acquisition of land therefor, is not affected by the fact of a later statute, in no way connected with the earlier one, making appropriation for securing sites and erecting a temporary capitol and for a penitentiary.

SAME—DEEDS—ESTATE CREATED. A deed to a territory for a capitol site conveys an estate in fee which passes to its successor, the state, without the use of words of succession in the grant.

¹Reported in 91 Pac. 15.

PUBLIC LANDS—DONATION ACT—TRANSFER BEFORE PATENT. Under 10 U. S. Stat. at Large, 305, § 2, repealing the provision in the Oregon Donation Act that all contracts for the sale of the lands prior to issuance of patent shall be void, a conveyance of a donation claim could be made before issuance of the patent provided the claimant had resided on the land for four years.

EVIDENCE—PAROL—DEEDS—CONDITION. It is inadmissible to prove that by a parol contemporaneous contract an absolute deed to a territory was made on condition that the territory should erect and maintain a capitol building on the land.

ESTOPPEL—BY DEED—CONDITIONS—STATES. Where the state has absolute title to land held for a capitol site, but to correct a supposed defect in the title, took a quitclaim deed from the former owners, conditional that such deed should be void if the capitol was located elsewhere, the state is not estopped, by the condition in the second deed, to assert its title under the first deed after breach of such condition; as it was only provided that the quitclaim should be void, not that the whole title should revert.

DEEDS—DESCRIPTION—CERTAINTY. A description in a deed of land in a certain donation claim, naming the section, township, range, and county, is not void for uncertainty in that it omitted the name of the town in stating the point of commencement at the corner of certain streets, as sufficient remains to accurately locate the land.

APPEAL—REVIEW—THEORY OF CASE. An action to quiet title tried in the court below as if upon sufficient pleadings, must be tried upon the same theory on appeal.

Appeal from a judgment of the superior court for Thurston county, Albertson, J., entered September 11, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

George Marvin Savage and *May L. Sylvester*, for appellants.

The Attorney General and *A. J. Falknor*, Assistant, for respondent.

FULLERTON, J.—The appellants brought this action against the State of Washington to recover a tract of land containing some ten acres, held by the state as a part of its capitol grounds. The appellant Clara E. Sylvester is the

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wife, and the appellant May L. Sylvester is the daughter, of Edmund Sylvester, deceased, and together they constitute his sole heirs at law. The land in question is a part of a larger tract patented by the government of the United States to Edmund Sylvester. The appellants claim the land as his heirs at law, contending that the muniments of title through which the state holds the property are either void and of no effect, or are subject to conditions which have been forfeited by the state.

Edmund Sylvester acquired title to the land under the act of Congress of September 27, 1850, commonly known as the Oregon Donation Act. 9 U. S. Stat. at Large, 496. The record shows that he made settlement upon it in 1850, filed his notification of such settlement with the surveyor general of Oregon in February, 1854, made final proof of his settlement and continuous residence on July, 1858, and received patent for the land in May, 1860.

On March 2, 1853, Congress passed an act creating the territory of Washington. The act specifically described the boundaries of the new territory, and provided for it a complete scheme of internal government. As a part of the governing body, it created a legislative assembly, and gave it power at its first session, or as soon thereafter as it should deem expedient "to locate and establish the seat of government for said territory, at such place as [it might] deem eligible; which place, however, shall thereafter be subject to be changed by said legislative assembly"; and the sum of five thousand dollars was appropriated out of the general treasury "and granted to said territory of Washington to be there applied by the governor to the erection of suitable buildings at the seat of government." 10 U. S. Stat. at Large, 172, *et seq.* The legislative assembly exercised the power thus granted at its second session. On January 9, 1855, it passed the following act: (Laws 1854-5, p. 5.)

"Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That the seat of Government of

this Territory be, and hereby is established and located on a certain piece or parcel of land on the land claim of Edmund Sylvester, in the county of Thurston, in section twenty-three, township eighteen north, range two west, containing ten acres, and more particularly described as follows: Commencing at a point south twenty-four degrees, twenty-three minutes west, nineteen and two one-hundredths chains from the northwest corner of Main and Union Streets, in the town of Olympia; thence south seven and fifty one-hundredths chains; thence west eight and fifty-eight hundredths chains; thence north, forty-seven degrees west, one and seventy-three hundredths chains; thence north, forty-eight degrees thirty minutes west, one and sixty hundredths chains; thence north sixty-five degrees west, one and ninety-three hundredths chains; thence north, thirty-three degrees thirty minutes west, two and eighty-hundredths chains; thence north, thirty-eight degrees west, one and seventeen hundredths chains; thence north, forty-five degrees west, one and eighty-seven hundredths chains; thence east sixteen and four hundredths chains, to place of beginning.

"Sec. 2. This act to take effect and be in force fifteen days after its passage: *Provided*, That within that time the present owners or claimants give a deed of release for the above-described ten acres of land to the territory of Washington without expense to said territory, which shall be deemed satisfactory by a joint committee to be appointed by both branches of the Legislative Assembly to examine and receive the same."

On January 18, 1855, nine days later, Edmund Sylvester and his wife, Clara E., conveyed to the territory of Washington the lands in the act described, and on January 29, 1855, the territory, by a special act, accepted the deed, authorized it to be deposited in the office of the secretary of the territory, and directed that the governor take possession of the tract described and "hold possession thereof, for the use and behalf of the Territory of Washington, in accordance with the first section of the act and to which this is a supplement." Possession of the tract was thereupon taken, which possession has been maintained by the territory and its successor, the state of Washington, from thence until the present time.

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The deed from Edmund Sylvester and wife to the territory was in form a deed of bargain and sale, the granting words being, "do grant, bargain, sell, convey and confirm unto the said" territory, etc. The *habendum* clause was as follows: "To have and to hold the same to the said party of the second part forever, free from any claim of the said party of first part, their heirs or assigns, or any or all persons claiming by, through, from, or under them or any of them." It was executed, as will be observed from the dates given, more than four years after Sylvester had made settlement upon the land, and more than a year after he had given notice to the surveyor general of Oregon of his intent to claim the same under the Oregon Donation Act, but was executed prior to the time he had made final proof of his settlement and cultivation, and prior to the time patent was issued to him therefor by the United States.

After the admission of the territory of Washington into the Union as a state, the legislature passed an act for the location of a capitol building on the land in question. At that time the then attorney general examined into the title of the state to the land, and advised that a deed be procured from the heirs of Edmund Sylvester in order to perfect the state's legal title. Pursuant to this opinion, after request made of them, the present appellants executed to the state a quitclaim deed to the land, reciting, however, that the deed was made and accepted on the express condition that the tract should be and remain the site for the capitol of the state of Washington, and that in the event of a breach of the foregoing condition, or in the event of the location of the capitol elsewhere than upon such tract, the deed should become null and void. The state, however, did not erect a capitol building upon this site. After spending some sixty odd thousands of dollars in the erection of a foundation for such a building, it abandoned the project, and erected a capitol building in another part of the city of Olympia, wherein all the state officers are now situate. But the state still maintains posses-

sion of the ten-acre tract, making biennial appropriations through the legislature for its care and preservation.

The foregoing facts are in the main undisputed. The appellants, however, make some question as to the time the notification to the surveyor general by Edmund Sylvester of his intent to donate the land was filed. They show that a survey of the land claim was made as late as April 22, 1857, and argue that inasmuch as the notification could not have been given until after the survey, it must have been given at a date later than the date found by the court. This contention is further supported by certificates from the surveyor general of Oregon and the register of the land office at Oregon city, Oregon, to the effect that neither office contains any record of the filing of such a notification. But the state produced a certified copy of the notification from the general land office at Washington. This paper bears on its face evidence of its genuineness, and shows conclusively that it was given at the date first above stated. It shows, moreover, that the claim had actually been surveyed prior to that time as it contains a description of it by metes and bounds corresponding in detail to the description given of the claim in the patent. The fact that this paper was not found in the offices where it would be expected to be found, does not detract from its character as evidence. The explanation is perhaps to be found in the fact that the territory of Washington was cut off from the Oregon territory between the time of the giving of the notification and the issuance of the patent, and the confusion arose in making the necessary transcription from the records incident to the creation of a new territory out of an old one. But be this as it may, there was no law requiring that this record be kept in the Oregon land offices, and the general land office at Washington, for its better preservation, might well take possession of it and maintain it as a part of its own files. We conclude, therefore, that the facts are correctly found. The question remaining is, did the court err in its conclusion of law to the effect that the state had title in fee to the land

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in suit? In discussing this question we will notice the several contentions of the appellants in the order in which they present them.

The first is that the original deed from Edmund Sylvester and wife to the territory of Washington was void for want of a grantee empowered to take title. The argument is that the territory, not being sovereign, had no inherent power to take title to land, and that such a power was not conferred upon it by Congress in the act creating the territory. But without inquiring into the sovereign capacity of the territory to take and hold real property, and conceding that no express authority was conferred on the territory by the organic act, we still think that it had power to acquire and hold land for the purposes of a capitol site. From the quotations heretofore made from the organic act, it will be observed that the Congress especially empowered the legislative assembly of the territory to locate and establish the seat of government for the territory, and made an appropriation for the erection of suitable buildings on the site so selected. The power to locate and establish the seat of government and erect suitable buildings thereon, must have necessarily included the power to acquire and hold such a quantity of land as was required for that purpose. To hold otherwise would be to deny the territory power to carry out the powers expressly conferred, as it is manifest that it could not establish a seat of government and erect suitable buildings for its purposes without acquiring a site upon which to establish the seat of government or erect the buildings. The appellants suggest that the legislative assembly might have acquired by lease sufficient land for its purposes. But this instead of being an argument against the existence of the power to acquire title to the land, is a concession in its favor, as it would require no greater act of sovereignty for the territory to acquire property for capitol purposes by a deed in fee than it would to acquire the same property by a lease for a definite or indefinite time.

The fact that the Congress at a subsequent session made another appropriation for the erection of a "temporary capitol, and for a penitentiary, inclusive of the sites of the buildings," does not require the holding that no authority to acquire title to land was included in the previous grant of power. The latter act is in no way connected with the earlier one, and certainly does not preclude us from applying to the earlier one the ordinary rules of construction.

The second contention is that the deed, since it did not run to the successors or heirs of the territory, conveyed to it an estate terminable at the end of its existence, and that in consequence the property reverted to the heirs at law of Edmund Sylvester when the territory was merged into the state. But the common law rule that the word heirs, or its equivalent, was necessary in a deed in order to convey a fee, had no application when the grant was to the crown. While the individual representing the sovereignty might change, the sovereign itself was immortal by perpetual succession, and on principle, a life estate to an ideal being having a perpetual and uninterrupted existence must be coextensive with a fee or perpetuity, and hence words of succession cannot extend it. For similar reasons the same result followed deeds at common law to corporations aggregate. Jones, *Real Property*, § 598; *Wilcox v. Wheeler*, 47 N. H. 488; *Asheville Division No. 15 v. Aston*, 92 N. C. 578. So, on similar principles, a deed to the territory did not require the words of succession in order to pass a fee. The deed, while in form to the territory, was in fact to the government, and while the form of government changed in the change from a territory to statehood, there was no lapse in the government itself. The government has had an uninterrupted existence.

The third contention is that the deed is void because prohibited by the donation act itself. As originally enacted, the proviso to the fourth section of the act did provide that all contracts by any person for the sale of the land which such person might be entitled to under the act before he received

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patent, should be void (9 U. S. Stat. at Large, 497, § 4), but by the amendatory act of July 17, 1854, 10 U. S. Stat. at Large, 305, § 2, it was further enacted, "That the proviso to the fourth section of the act of twenty-seventh of September, eighteen hundred and fifty, above mentioned, by which all contracts for the sale of lands claimed under that law, before the issue of patents therefor, are declared void, shall be, and the same is hereby, repealed: *Provided*, That no sale shall be deemed valid, unless the vendor shall have resided four years upon the land." This act has been held by this court, as well as by the supreme court of the United States, to permit a donation land claimant after four years' residence and cultivation, to sell and convey his claim, whether he had received patent therefor or not. *Roeder v. Fouts*, 5 Wash. 135, 31 Pac. 432; *Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265; *Brazee v. Schofield*, 124 U. S. 495, 8 Sup. Ct. 604, 31 L. Ed. 484; *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063.

The deed in question here was executed after Edmund Sylvester had completed a four-years residence upon the claim. As shown by his own affidavits and the affidavits of his witness on which patent was issued, he commenced his residence on the land sometime in 1850, and resided upon it continuously until he made the deed to the territory, on January 18, 1855, a period of over four years. His deed, therefore, was not void for want of title in himself, nor did it violate any rule of public policy.

The appellants cite *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929, as overruling the earlier case of *Barney v. Dolph*, *supra*, but a more careful examination of the case will show that this is not so. The earlier Oregon cases, and some cases in the inferior Federal courts, had laid down the rule that the donation act was a grant *in praesenti*, the donor taking a present title subject to be defeated by conditions subsequent, and *Barney v. Dolph* was thought to affirm that principle. The case cited merely holds that this was not a correct con-

struction of the act, and that it was not intended in *Barney v. Dolph* to so hold. It held that the grant did not take effect until the settler had resided upon and cultivated the tract for four consecutive years, and otherwise conformed to the provisions of the act, but did not depart from the rule that the settler had power to convey the fee after having resided upon the land and cultivated the same for four consecutive years.

The fourth contention is, that the trial court erred in excluding parol evidence tending to show that the first deed was executed upon the condition that the territory would erect and maintain a capitol building upon the land conveyed. But manifestly there was no error in this. No rule of law is more uniformly applied than is the rule that a parol contemporaneous agreement cannot be shown to vary the terms of a written instrument. This rule is applicable here, as a deed is such an agreement as falls within the rule. Devlin, Deeds (2d ed.), § 850a.

The fifth contention is that the second deed, the deed made by the present appellants to the state, governs and determines the status of the parties and the tenure by which the state holds the land in question. Much of the argument under this branch of the case is based on the assumption that the first deed was invalid and insufficient to convey the title of the property to the state, but since we hold the deed to be valid and sufficient for that purpose, we need not follow the appellants into this branch of their argument. They argue further, however, that the state, having sought for and obtained the second deed, is now estopped from asserting that it holds the land under a different tenure than that expressed in such deed. But we cannot think the conclusion necessarily follows from the conduct of the state. Doubtless the appellants could have made it a condition on giving the second deed, if the state would have consented, that the land should revert to them in case the state should cease to use it as a capitol site, but they did not do this. The remedy reserved for a breach

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of the condition was that the deed itself should be void,—that is to say, the state, by failing to perform the conditions, could claim nothing by virtue of the deed, but it was not provided that it must surrender all the rights it had acquired by virtue of the earlier instrument by a failure to keep these conditions, and to be enforced it must have been so expressly provided, as no such condition could be implied.

The sixth is that the original deed is void for want of a sufficient description of the property conveyed. The deed followed the description contained in the act locating the seat of government above quoted, with the exception that it omitted the phrase “town of Olympia” following the words “Main and Union streets.” But the omission did not render the description void. Enough remained to accurately locate the land conveyed, and this is all that is necessary to constitute a sufficient description.

Lastly, the appellants object to the sufficiency of the answer filed on behalf of the state, contending that it contains an admission that the state holds the land in question subject to forfeiture in case it ceases to use it for a capitol site. We do not so read the answer, but if it required that construction it would not alter the appellants’ position. The case was tried in the court below as if upon sufficient pleadings, and we must consider it upon the same theory in this court. To do otherwise would be to deny to the respondent the benefit of the statutes relating to amendments.

As we find no error in the record the judgment will stand affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

ROOT, J. (dissenting)—I dissent. I think Mrs. Sylvester should have been permitted to give testimony as to what the real consideration was for the grant which she and her husband made to the territory of Washington. It is almost, if not entirely, a justifiable inference from the statutes and deed that this grant was made upon the understanding that this

land was to be used as the permanent site of the capitol for the territory and succeeding state. Her testimony was offered to fully establish this. I think it should have been received. The patriotism and beneficence manifested by Mr. and Mrs. Sylvester toward this commonwealth in its early infancy should not be repaid by a rigorous application of technical rules at this time. If, as I believe, they conveyed this land for the sole purpose of its being, and with the understanding with the territorial authorities that it should be, the permanent site of the capitol of the territory and state, I think that good faith and fair dealing require that the land should now revert, inasmuch as it has ceased to be used for the purpose for which it was thus granted.

[No. 8631. Decided July 15, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. AL. MORAN,
Appellant, THOMAS MORAN *et al.*, *Defendants*.¹

STATUTES—TITLES AND SUBJECTS OF ACTS—INTOXICATING LIQUORS. Laws 1903, p. 31 (3 Bal. Code, § 2944a), entitled an act providing for the search and seizure of liquors kept or used contrary to law, and the punishment as misdemeanors of all violators thereof, does not violate Const. art. 2, § 19, providing that no bill shall embrace more than one subject; and the title is broad enough to include provisions making it a misdemeanor to keep or maintain a place where liquors are kept or sold contrary to law.

INTOXICATING LIQUORS — OFFENSES — LIQUORS PROHIBITED. In a prosecution for keeping a room for the sale of intoxicating liquors contrary to law, it is not error to instruct that beer is an intoxicating liquor.

CRIMINAL LAW—TRIAL—VERDICT—MISTAKE. Where it is evident from the verdict that the jury has made a mistake in the name of the only defendant found guilty, it is not error to require the three defendants to stand up and be identified.

¹Reported in 90 Pac. 1044.

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Opinion Per Root, J.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered October 17, 1906, upon a trial and conviction of the crime of maintaining a nuisance in selling intoxicating liquors without a license. Affirmed.

Healy & Slentz and J. J. Noethe, for appellant.

Virgil Peringer and George Livesey, for respondent.

Root, J.—Appellant herein was charged and convicted upon an information filed under 3 Bal. Code, § 2944a (Laws 1903, page 31). Prior to the trial, a motion to quash the information was interposed, as was also a demurrer, and both were denied. Judgment was rendered upon a verdict of guilty, and from such judgment this appeal is prosecuted.

The main contention of appellant is that the statute in question is unconstitutional as being in conflict with § 19, art. 2, of the state constitution, which reads: "No bill shall embrace more than one subject, and that shall be expressed in the title." The title of the act here involved is as follows:

"An act providing for the search for and seizure of liquors received, kept, or used, contrary to law and the appliances used in connection therewith and to define and punish as misdemeanors all violators thereof, and vesting all magistrates with authority to receive complaints and issue warrants against all persons violating the provisions of this act."

The first three sections of the statute read as follows:

"Sec. 1. That every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others or who shall in any manner aid, assist or abet in keeping or maintaining any room or rooms, place or places in which intoxicating liquors are received or kept for unlawful use, barter or sale or for unlawful distribution; and every person who shall receive, barter, sell, assist or abet another in receiving, bartering or selling any intoxicating liquor so received or kept, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided.

"Sec. 2. The keeping or maintaining of any place in which intoxicating liquors are sold or given away, contrary to law, or in which such liquors are kept or harbored for the evident

purpose of selling or giving away said liquors contrary to law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors or where intoxicating liquors are kept for the purpose of inducing people to resort, to buy or receive intoxicating liquors in violation of law is hereby declared to be a common nuisance. Upon complaint being made of the violation of this section a magistrate shall issue a search warrant in which the premises in question shall be particularly described, commanding the sheriff or constable to thoroughly search the premises in question and to seize and hold all intoxicating liquors, vessels, bar fixtures, screens, bottles, glasses, jugs and other appurtenances found therein adapted to be used in retailing, giving away or distributing liquors in violation of law, to make a complete inventory thereof and deposit the same with the magistrate.

"Sec. 3. The property seized under the warrant shall remain in the custody of the officer until the case has been decided by the court; if the defendant is found guilty the property seized shall be destroyed by the officer under the direction of the magistrate."

The information charged appellant and two others with "the crime of maintaining a nuisance in selling intoxicating liquors without a license, committed as follows." Then followed a description of certain premises which, it was alleged, the defendants kept and maintained, and in which "said room, place and building or buildings, intoxicating liquors were received and kept, for unlawful use, barter and sale, and for unlawful distribution," and that they there kept the room, place or building "in which intoxicating liquors were sold and given away, contrary to the law, and in which said intoxicating liquors were kept and harbored for the purpose of selling and giving away, contrary to law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors, and where intoxicating liquors were kept for the purpose of inducing people to buy and receive intoxicating liquors, in violation of law," and said defendants did then and there "sell and barter intoxicating liquors, thereby maintaining a common nuisance, contrary to § 2944a, . . . no license having been issued to said defendants."

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The evident purpose of the constitutional provision invoked was to prevent the legislature from placing in a bill matters of which the title gave no intimation, and to discountenance the joining in one act of incongruous matters. Speaking of a constitutional provision of this character, Cooley on Constitutional Limitations (7th ed.), pp. 205-6, says:

"The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. . . . The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection."

In the case of *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077, this court said:

"As the constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title;" citing *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431.

In the case of *State v. Hall*, 24 Wash. 255, 64 Pac. 153, the following expression was given:

"The general rule is that if the matters embraced in a statute have congruity, or are naturally connected with each other, or are cognate and germane to each other, the statute does not embrace more than one subject and in determining these questions the constitution must not be so narrowly construed as to unnecessarily hamper or cripple legislation. It is also a general rule, applicable particularly in construing stat-

utes with reference to their titles, that statutes must be held constitutional unless they are clearly void."

Similar expressions are found in the case of *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, and in *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520. In the latter, the court said, with reference to this identical constitutional provision:

"How shall this provision be interpreted? What shall the word 'subject,' as used therein, be held to mean? Courts are bound to give such an interpretation to this provision as will make it reasonable and at the same time give it full force. . . I am of the opinion that the legislature must be the judge of the scope which they will give to the word 'subject,' and that so long as the title embraces but one subject it is not inimical to such constitutional provision, even although the subject as thus used contains any number of sub-subjects."

Applying the principles thus announced to the case at bar, we do not think the statute in question should be held invalid. The title of the act may not be skillfully drawn and the substance of the act may at first glance appear not to be confined to one subject-matter; but we do not think that there is such an incongruity between the different matters dealt with or such a defect in the title as to render the statute obnoxious to the constitution.

It is also urged that the court erred in giving the following instruction:

"It is not necessary that the state prove that any liquor was sold, it is sufficient if the state prove beyond a reasonable doubt that the defendants or either of them, maintained a place in which intoxicating liquors were sold or given away, or where intoxicating liquors were harbored for the evident purpose of selling and giving away said liquors, contrary to law, or where persons were permitted to resort for the purpose of drinking intoxicating liquors."

Taking into consideration the other instructions given, we do not think the giving of this was error.

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Syllabus.

It is also urged that the court was in error in instructing the jury that beer is an intoxicating liquor. We think this contention has no merit.

The jury returned a verdict of not guilty as to two of the defendants, and a verdict of guilty as to one. When the verdicts were first returned, it seems to have been apparent that an error was made in the name of the defendant sought by the jury to be returned as guilty. The defendants were required to stand up and be identified, and the jury was asked to, and did, retire. The record is not very complete as to just what transpired. We can find nothing in the action of the court that infringed any substantial right of the defendant.

The judgment of the superior court is affirmed.

HADLEY, C. J., MOUNT, FULLERTON, and CROW, JJ., concur.

[No. 6637. Decided July 15, 1907.]

B. L. MUIR, *Respondent*, v. W. MOELLER, *Appellant*.¹

BROKERS—CONTRACT—PERFORMANCE WITHIN AGREED TIME—EVIDENCE—SUFFICIENCY. In an action to recover a broker's commission for procuring a purchaser prior to 3:30 p. m. of the same day the contract was made, the evidence is sufficient to sustain findings for the plaintiff, where it appears that he procured a purchaser ready and able to buy on the terms stated within the required time, but a change in the terms of the contract being suggested, the owner referred the same to his attorney, and finally consented thereto late the same afternoon, but demanded the purchaser's signature to the modified contract before 9:30 o'clock the next morning; that, upon its being explained that it would be difficult to find the purchaser by that time, the owner remained silent, thereby acquiescing in delay for a reasonable time; and that the purchaser signed the modified contract the next morning as soon as he could be found, and is still ready and willing to buy the property.

¹Reported in 90 Pac. 1042.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 12, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Harrison Bostwick, for appellant.

Vince H. Faben, for respondent.

HADLEY, C. J.—The plaintiff sued the defendant to recover upon a real estate brokerage contract. The contract set forth in the complaint is as follows:

“This agreement made between W. Moeller hereinafter called the first party, and B. L. Muir & Co., called the second party, Witnesseth, That in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged by first party and of valuable services performed and to be performed by the said second party, the said first party hereby grants the said second party for a term of until 3:30 p. m. today the exclusive and irrevocable right to sell the following described premises, to wit: Lots 6-7 E. 270 ft. 14-15-16-17-, B 279 for \$13,500.00 dollars, payable as follows: Consideration must be \$1,000 deposited and balance 10 days after title is shown good and in case a purchaser is found, willing, able and ready to purchase and pay for the said property upon said terms, or any less price the said first party may accept. The said first party hereby agrees to furnish an abstract of such property showing perfect title to date of sale and to convey said premises to such purchaser by good and sufficient warranty deed of conveyance. And the said first party agrees to pay said second party a commission of five per cent upon the selling price of said property, and in addition thereto, all over said selling price above expressed that the second party may sell said premises for.”

The contract was signed on the 15th day of January, 1906, the words “until 3:30 p. m. today,” used in the body of the contract, referring to said date.

It is alleged that within a few moments of the time of its execution and prior to 3:30 p. m. of said day, the plaintiff procured and produced a purchaser who was ready, able, and

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willing to buy the property upon the terms expressed in the contract, and that thereupon tender was made of the part of the purchase money which was to be paid at once; that thereafter the defendant, without cause, refused to make conveyance of the property to the purchaser; that the purchaser is still ready, able, and willing to purchase upon the terms aforesaid; that plaintiff has done and performed all things required of him under the contract, and that there is due him as commission provided by the contract the sum of \$675, for which amount he demands judgment. The defendant denied that a purchaser was procured according to the terms of the contract. The cause was tried by the court without a jury, and resulted in a judgment for plaintiff for the amount demanded in his complaint. The defendant has appealed.

After finding the execution and existence of the brokerage contract, the court found as follows:

"That immediately thereafter the plaintiff procured a purchaser for said real estate who was ready and willing to pay the price mentioned in said contract therefor, and who was competent and capable of paying and who was willing to pay in cash the full contract price for said real estate as was necessary to procure the same; and that said purchaser is still ready and willing to purchase said property at said price and is capable of paying the price thereof.

"That on the 15th day of January, 1906, prior to the hour of 3:30 p. m. on said day the defendant entered into negotiations with a purchaser so as aforesaid produced by the plaintiff, for the sale to him of said real estate and the negotiations therefor continued into the 16th day of January, 1906, and that on the 16th day of January aforesaid said purchaser being still ready and willing to purchase the same but the defendant refused then and there and has ever since refused to carry out his part of said contract of purchase and sale."

It is contended by appellant that these findings are not supported by the testimony. There was testimony that before 3:30 p. m. of the day named, the respondent produced a purchaser who was ready, able, and willing to purchase the property at the price of \$13,500 named in the brokerage contract.

A proposed memorandum of agreement of purchase which had been signed by the purchaser provided for ten days' time after the delivery of an abstract of title for examination of the same; that \$500 cash should be immediately paid; that \$6,500 further cash should be paid ten days from the date of the contract, and \$6,500 within two years, with interest at six per cent per annum. This proposed agreement was shown to appellant, and he declined to sign it until his attorney, Mr. Bostwick, had examined it. It differed from the terms mentioned in the brokerage contract by making a deferred payment of the last \$6,500, and, also, in providing for \$500 cash deposit instead of \$1,000. It was testified that he was told at the time by respondent that he could have the other \$500 immediately if he demanded it, but that he said he would not demand it as he was satisfied with the responsibility of the purchaser. All this occurred, according to respondent's testimony, before 3:30 p. m. of said January 15, the day the brokerage contract was made, that contract having been made about noon of said day. Upon appellant's suggestion that he would like for Mr. Bostwick to examine the proposed contract of purchase, he and respondent at once went to Mr. Bostwick's office for that purpose. This interview resulted in an agreement that Mr. Bostwick should draw up an agreement in different form, providing for \$500 immediate cash payment, \$6,500 on or before January 25, being ten days hence, and \$6,500 on or before January 25, 1907, the last payment to be evidenced by a bankable promissory note, or if not bankable, that certain leases should be placed in escrow with it. Such a paper was then drawn. As to what then occurred, respondent testified as follows:

"When the contract was drawn, which was about 5:30, I explained to Mr. Bostwick that I would get it signed now, if possible, but I thought it likely that Mr. Stirrat had gone from the office, to which he said in a very brusque way, 'If that contract is not signed by 9:30 o'clock tomorrow morning, call the deal off.' I explained to Mr. Moeller that it would possibly be later than that the next day before I could get to

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Mr. Stirrat, if I could not get him now, as he usually did not get to his office before 10 o'clock or 11, but that I would have it signed right now, if possible, and he made no reply. I went to Mr. Stirrat's office at once and found that he had left for the night. Mr. Stirrat has so much building on hand, and so many jobs under construction, that it is very difficult to locate him, but he did not return again to his office that evening. I left word for him to call me up as soon as he came to his office, and also 'phoned to the house, but I did not succeed in finding him, until the next day, about 10 o'clock. As soon as I explained the condition and facts to Mr. Stirrat, I handed him the agreement which Mr. Bostwick had prepared, and after reading the same over, he signed it, with one exception that was in the event that Mr. Moeller could not deliver the property free and clear from all encumbrances that Mr. Stirrat was to have his \$500 back. I went at once, with the contract which was signed by Mr. Stirrat, and the \$500 check to Mr. Bostwick's office, expecting to find Mr. Moeller there. I met no one in the office at that time. In a few minutes I returned and found the stenographer and Mr. Bostwick in his private office. I explained to Mr. Bostwick that I had the contract signed just as he had drawn it, with this one exception, that if the sale did not go through, that Mr. Stirrat was to have the deposit returned. To this Mr. Bostwick replied, 'Mr. Moeller has gone home and has instructed me to say the sale is off.' I said, 'Mr. Bostwick, you certainly don't mean anything of that kind, because we have made the sale, and we expect it to go through.' Mr. Bostwick said, 'That is all I know about it, Mr. Moeller has gone home and said the sale was off.' Mr. Bostwick made no objections to the alteration of the contract—simply said that the sale was off, and gave that as a reason for it, that I was too late. He claimed that I should have been there at 9:30 or before. I still insisted that the agreement was that I was to have until I could get Mr. Stirrat. I went out then, and tried to find Moeller, but could not find him. Called at his house, and also 'phoned several times, but Mr. Moeller has no place of business, except his house, and it was therefore very difficult to find him."

Under the above testimony and other testimony to which we have referred, the findings of the court were justified. A

purchaser was produced before 3:30 p. m., the time fixed, and he was ready, able, and willing to buy the property. Some modification of the terms was suggested and, in conformity with appellant's desire, they immediately repaired to the office of appellant's attorney to continue the negotiations, with the result above stated. The purchaser himself was not present at the interview and it became necessary for respondent to procure his signature to the newly prepared agreement of purchase. Although Mr. Bostwick stated that the agreement of purchase must be signed and returned by 9:30 the next morning, yet when respondent, immediately after that statement, appealed directly to appellant and stated the circumstances about the probable difficulty of quickly finding the purchaser and that he probably could not return before 11 o'clock the next day, he says appellant remained silent. A reasonable time to get the purchaser's signature was permissible. Under the circumstances appellant's silence should be taken as his consent. The purchaser himself testified at the trial that he was and still is ready, able, and willing to buy on the terms proposed. We think there was sufficient evidence to justify the court in finding that a competent purchaser was produced within the time, but that with appellant's consent negotiations merely as to terms of payment began at once, which negotiations were continued also by appellant's consent until the next day. The transaction thus became a continuous one after a competent purchaser was produced through the efforts of respondent. The purchaser met every demand of appellant's within reasonable time. The change of terms as to payments was with appellant's consent. This was effected by negotiations directly through respondent as the broker, and thereby, in effect, became a part of the original brokerage contract.

In view of the findings of the court, which we shall not disturb under the evidence, the judgment is affirmed.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

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Opinion Per HADLEY, C. J.

[No. 6782. Decided July 17, 1907.]

JOHN GRAHAM, *Appellant*, v. H. BELL-IRVING, *Respondent*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence in an action at law tried before the court without a jury will not be disturbed on appeal.

ESTOPPEL—PAYMENT ON ACCOUNT—CONTRACTS—BREACH—REMEDY. A payment on account, prior to the completion of a contract, does not estop the payor from repudiating the contract upon a complete breach thereof by the other party.

APPEAL—REVIEW—ERROR FAVORABLE TO APPEAL. Appellant cannot complain of error in refusing to allow the respondent a counterclaim, upon dismissing appellant's action on the merits.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 11, 1906, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing on the merits an action on a contract of employment. Affirmed.

Jerold Landon Finch, for appellant.

Piles, Howe & Farrell, for respondent.

HADLEY, C. J.—The plaintiff in this action brought the suit to recover for services as an architect. He alleges a contract with the defendant of the following import: That he was on July 11, 1904, employed to form, draw, and write the preliminary sketches, plans, and specifications for a certain building which the defendant proposed to erect in the city of Vancouver, British Columbia; that defendant promised to pay as compensation therefor a sum equal to two and one-half per cent of the amount of the lowest or accepted bid, as the case might be, of a contractor afterwards to bid for the contract to erect said building according to the plans and specifications so prepared; that acting under said contract of em-

¹Reported in 91 Pac. 8.

ployment, the plaintiff prepared such sketches, plans, and specifications, and delivered them to the defendant at Vancouver on the 3d day of September, 1904; that defendant accepted them and instructed plaintiff to call for and receive from contractors bids to erect said building according to the plans and specifications; that acting in accordance with such instructions, the plaintiff called for bids and received from the contractor a bid for \$32,800, which was the lowest bid; that on the 7th day of September, 1904, defendant paid to plaintiff \$300 to apply upon the contract aforesaid; that the total amount of compensation under the contract is \$820, no part of which has been paid except said \$300. Judgment is demanded for \$520.

The defendant answered with certain denials and admissions, and alleged affirmatively that he employed plaintiff to prepare plans and specifications for a building to cost \$20,000, and with all extras to cost not to exceed \$25,000; that the plaintiff accepted the employment, and assured defendant that he—plaintiff—could accurately estimate the cost of work in Vancouver, and that the building which defendant desired to erect could be erected according to the plans and specifications which were to be prepared by plaintiff for not to exceed \$20,000, with an outside limit of \$25,000, including all extras; that defendant employed plaintiff only upon the express understanding that the building could be erected for an amount within the above-mentioned sums according to the plans to be prepared, and that bids could be obtained for the erection at said figures. He further alleges that, after the delivery of certain plans and specifications and before the calling for bids, he paid plaintiff \$300, but that in response to the call for bids the lowest bid was \$35,000; that by reason of the fact that the lowest bid was \$10,000 in excess of the highest sum which the plaintiff had assured defendant the building would cost, defendant was financially unable to erect the building, and the plans and specifications were wholly worthless to defendant, the return thereof being tendered in

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Opinion Per HADLEY, C. J.

court; that the plans and specifications have never been used by the defendant except to call for bids as aforesaid. The answer sets up a counterclaim for the return of the \$300 paid. The reply denied much of the affirmative matter in the answer, and upon issues as before stated, the cause was tried by the court without a jury, and resulted in a judgment that plaintiff shall take nothing by the action, and that his complaint shall be dismissed. The plaintiff has appealed.

The findings of the court are substantially in accord with the allegations of respondent's answer. Aside from certain correspondence between the parties, the only evidence before the court was the testimony of appellant and respondent. Respondent's testimony fully supported his answer, and therefore negatived the contract alleged in the complaint. The burden was upon appellant to establish the contract which he alleged. The trial court found the preponderance of the evidence to be with respondent, and we shall not undertake to say from anything appearing in the record that the court erred in that particular. With the facts established as found by the court, it would be manifestly wrong for appellant to recover. The court found that appellant was obligated by the contract between the parties to prepare plans and specifications for a structure to cost not to exceed \$20,000, and with all extras not to exceed \$25,000; that the lowest bid under the plans prepared was \$35,000, which was \$10,000 in excess of the highest sum appellant had assured respondent the building would cost. Under such facts there was a plain failure to prepare plans that would come within the limitations of the construction cost fixed by respondent, a straight breach of the contract. Appellant is therefore not entitled to recover upon the contract, and he is no more entitled to recover upon a *quantum meruit*. Respondent has neither accepted nor received any benefits from appellant's work, and he offered to fully return the plans.

It is argued that the respondent's payment of \$300 on account of the plans amounted to an acceptance. The payment

was made before it had been demonstrated by the bids that the plans would not meet the requirements of the contract in the matter of cost of construction. It was a payment made upon account, somewhat hastily perhaps, but under the circumstances it was not an act which bound respondent to an acceptance of the plans.

Appellant argues that to support consistency in the judgment he should either have had judgment for the contract amount he claims, or that the court should have given respondent judgment for the return of the \$300 which he paid. The court refused this relief to respondent under his counterclaim. Even if it be true that respondent was entitled to recover the \$300, still he has not appealed from the judgment and is not complaining. The judgment permits appellant to keep that money, which is in his favor. It is therefore not prejudicial to him in that respect and affords him no ground for complaint here. *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397; *Seattle Brewing etc. Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823.

Under the record, we think the judgment must be affirmed.

FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

[No. 6762. Decided July 17, 1907.]

RUSH BANKS, *Appellant*, v. EASTERN RAILWAY & LUMBER COMPANY, *Respondent*.¹

TORTS—MALICE—WRONGFUL MOTIVE IN LAWFUL ACT—MASTER AND SERVANT—SELECTION OF HOSPITAL. A physician who conducts a public hospital has no cause of action against a lumber and railway company for maliciously paying hospital dues, deducted from the wages of its employees, to a rival hospital, and requiring such employees to receive attendance from such rival hospital, after the employees had requested the payment of such dues to the plaintiff, whose hospital they wished to patronize; since the employer may select its own hospital, is under no contract obligation with the plaintiff, and is not liable for malice in lawfully employing men under agreement to attend a hospital of its own selection.

¹Reported in 90 Pac. 1048.

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Opinion Per CROW, J.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 2, 1907, in favor of the defendant, upon sustaining a demurrer to the complaint, dismissing an action for damages alleged to have arisen in tort. Affirmed.

Frank Burch, for appellant.

George Dysart and Maurice A. Langhorne, for respondent.

CROW, J.—The plaintiff, Rush Banks, in his amended complaint, has alleged, that he is a duly licensed physician, engaged in the practice of his profession in Centralia, Washington, where he also conducts a public hospital; that the Eastern Railway & Lumber Company is a corporation, engaged at Centralia, Washington, in the manufacture of lumber and shingles, employing a large number of men; that such employees are fully paid by the defendant, save and except that fifty cents per month has been retained from the wages of each man and disbursed by the defendant for hospital and medical services; that the defendant required the payment of such monthly installment by each employee; that on or about January 9, 1906, fifty-six employees of the defendant, so desiring, did select the hospital and the medical services of plaintiff, and did serve upon the defendant a written demand that their hospital dues be thereafter paid to the plaintiff; that in consideration of such selection and written demand, the plaintiff issued to each of such employees a certificate which entitled him to medical and surgical treatment at his hospital; that the defendant has refused to pay any hospital fees to plaintiff; that it has refused to comply with the written demand of its employees in that regard; that its acts are wanton, wilful, and malicious, and done with the intent of harassing plaintiff and injuring his business; that, with such malicious intent and purpose, the defendant has notified its employees that all hospital dues will be paid to the J. H. Dumon hospital, and that any employee not consenting to such payment will be

discharged; that it was necessary for defendant's servants to have employment; that by reason of such necessity they have been compelled to submit to the conditions so imposed upon them; and that, by reason of the defendant's wrongful, wilful, and malicious acts, the plaintiff has been damaged in the sum of \$5,000, for which he demands judgment. Although the amended complaint is quite voluminous, the above completely states the substance of its material allegations. The defendant interposed a general demurrer, which being sustained, the plaintiff refused to further plead, and judgment was entered dismissing the action. The plaintiff has appealed.

The only question before us is whether the honorable trial judge erred in sustaining the demurrer. He did not, as the amended complaint fails to state facts sufficient to constitute a cause of action. The respondent was entitled to employ its servants upon the conditions alleged. It had a perfect right to contract for the retention of reasonable hospital fees and reserve to itself the privilege of selecting the physician to whom such fees should be paid. The contract, which did not profit the respondent, was made for the direct benefit of its employees. Appellant made no agreement with the respondent. There was no privity of contract between him and respondent. The contract between the respondent and the employees was not made for the benefit of appellant and he had no right of action thereon. If appellant made any contract which has been violated, it was with the fifty-six employees to whom he issued hospital certificates. He cannot dictate the manner in which the respondent shall conduct its business, nor can he, by any agreement with respondent's employees, to which respondent is not a party, compel it to change the terms of its contracts of employment.

Appellant places much reliance on the allegation of malice, but if the respondent is conducting its business in a lawful manner, making and performing valid contracts with its employees, the mere incident of a malicious motive toward the appellant does not of itself warrant a recovery.

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Syllabus.

Appellant contends this is an action in tort, based on the malicious and wanton acts of the respondent, and seems to predicate his right to recover upon respondent's wrongful motive. Judge Cooley, at page 1505 (*832) of vol. 2, third edition, of his work on Torts, says:

"Bad motive, by itself, then is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.' 'Where one exercises a legal right only, the motive which actuates him is immaterial.' When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged."

In substance, the act of respondent of which appellant complains is that it has maliciously caused its employees to violate their contract with him; but the acts herein alleged give the appellant no cause of action as against respondent. *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

[No. 6697. Decided July 22, 1907.]

JAMES STANGAIR, *Appellant*, v. JOHN ROADS, *Respondent*.¹

ADVERSE POSSESSION—BOUNDARIES—TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY. Upon an issue as to the adverse possession of land along a boundary line, it is not an invasion of the province of the jury to instruct that one acquires no title by laying his fence by mistake if he makes no claim to the lands up to the fence, but only to the true boundary as it may be subsequently established.

TRIAL—VERDICT—WAIVER. It is not error to submit two forms for a general verdict in an action of ejectment, in the absence of any request for special findings as provided by Bal. Code, § 5021.

¹Reported in 91 Pac. 1.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered June 30, 1906, upon the verdict of a jury rendered in favor of the defendant, in an action to recover possession of real property. Affirmed.

H. C. Leiser and E. M. Green, for appellant.

A. L. Miller and W. W. Sparks, for respondent.

ROOT, J.—In a case between these same parties, reported in 41 Wash. 583, 84 Pac. 405, the contention of respondent as to the location of a lost corner was upheld. This action is to recover possession of a small parcel of land lying within the boundaries of respondent's land as determined by that action. Appellant herein based his right to the possession of this land upon a claim of adverse possession for more than ten years. The case was tried to a jury, which returned a verdict in favor of respondent. Upon the verdict was entered a judgment from which this appeal is taken.

The main contention of appellant is that the evidence does not sustain the verdict. We do not think this contention can be upheld. The question turned largely as to the time when a certain fence was built. Upon this there was a conflict in the evidence. We think there was a sufficient amount of evidence which, if believed, would justify the jury in the verdict which they returned, and that the trial court did not commit error in denying the motion for a new trial on this ground.

Exceptions were taken to several instructions given by the trial judge, and the giving thereof is here assigned as error. Those had to do principally with the question of what constituted adverse possession, and we think they were in accord with prior decisions of this court. One of the instructions given by the trial court, the giving of which is urged to be error, is as follows:

"Our supreme court has laid down this rule which I give you as the law in this case: If one by mistake incloses the lands of another, and claims it as his own, his actual possession will work a disseizure, but if ignorant of the boundary line,

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Opinion Per Root, J.

he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently established, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

It is urged that this was an invasion of the province of the jury, and a comment upon the facts of the case. We do not so understand it. The trial court laid down the rule as it had been heretofore announced by this court. *Thornely v. Andrews*, 45 Wash. 413, 88 Pac. 757. Taking the instruction in connection with the others given, we think it was calculated to assist the jury in determining the issue which they were to determine, and was in no manner prejudicial to the rights of appellant.

It is also contended that the court erred in giving the jury two forms of verdict, and in instructing them to find generally for plaintiff or defendant, instead of requesting them to render a general or special finding, as provided in Bal. Code, § 5021 (P. C. § 636). It does not appear that appellant requested any special finding, and we fail to find any merit in this contention.

The judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 6828. Decided July 22, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Arthur Royse, Plaintiff*, v. THE SUPERIOR COURT FOR KITSAP COUNTY *et al., Respondents*.¹

CERTIORARI—REMEDY BY APPEAL—ADEQUACY—OFFICERS—RIGHT TO OFFICE—REVIEW. Certiorari lies to review a judgment determining the right to a public office where the remedy by appeal would be inadequate because the term of office would expire before the hearing.

OFFICERS—VACANCY—RESIGNATION—NECESSITY OF ACCEPTANCE. An acceptance of the resignation of a city councilman is necessary in order to create a vacancy, under the common law rule, which is not abrogated by Bal. Code, § 1548, providing that every office shall become vacant on the resignation of an officer before expiration of his term, since nothing is said as to the method of effecting a resignation.

Certiorari to review a judgment of the superior court for Kitsap county, Gilliam, J., entered June 15, 1907, upon sustaining a demurrer to the complaint, dismissing an action to obtain possession of a municipal office as the qualified official thereof. Affirmed.

James W. Bryan, for plaintiff.

Thomas Stevenson, for respondents.

HADLEY, C. J.—This cause is before this court on writ of review. The relator here was the plaintiff in the court below. The cause was determined by sustaining a demurrer to the complaint and by the dismissal of the action, the plaintiff declining to plead further. The complaint in effect alleges, that the city of Bremerton is a city of the third class, and that on December 5, 1905, one Gruwell was elected as councilman for the third ward of said city, to serve a term of two years from and after the first Monday in January, 1906; that thereafter,

¹Reported in 91 Pac. 4.

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on November 2, 1906, said Gruwell resigned as councilman, the resignation being in writing; that the resignation was read in open council on November 5, 1906, at the first regular meeting after the date of the resignation, and that said Gruwell has never since said November 2, 1906, exercised or attempted to exercise any of the duties of said office; that at a regular annual election held in said city on December 4, 1906, the plaintiff was elected as councilman to fill the unexpired term of said Gruwell, resigned; that thereafter, on March 22, 1907, the said city council, acting as a board of canvassers, under and in obedience to a writ of mandate issued out of the superior court, canvassed the returns of said election, and issued to the plaintiff a certificate of election; that thereafter, on March 25, 1907, the plaintiff filed his oath of office with the city council and demanded recognition in his said official capacity; whereupon he found his seat occupied by Robert Stewart, the defendant, said Stewart claiming to hold by virtue of his appointment by said city council to said office on December 10, 1906, six days after the election of the plaintiff to the office; that said Stewart is a usurper of the office, and that he wrongfully withholds the same from the plaintiff. Judgment is prayed that the defendant Stewart be ousted from the office, and that the plaintiff be put in possession of the same. The defendant's demurrer to the foregoing allegations having been sustained and judgment of dismissal entered, the plaintiff applied to this court for a writ of review, which was granted.

The relator had the right of appeal from the judgment, but it was believed that such remedy would be inadequate, as the appeal could probably not have been determined before the time for which the relator claims the office in question expires, thus rendering the appeal fruitless. For said reason the writ of review was granted in pursuance of the rule heretofore followed in similar cases. *State ex rel. Meredith v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

The question involved in the ruling upon the demurrer to the complaint is, was there a vacancy in the office of councilman of the third ward of Bremerton at the time the relator claims to have been elected thereto. If Gruwell's resignation was not complete at the time of the election, there was no vacancy, and the effort to elect the relator was fruitless without a vacancy to fill. It will be observed that the complaint does not allege that the resignation had been accepted by the council prior to the election, either by the appointment of a successor or by any other action taken. The complaint merely shows that the communication tendering the resignation was read before the council. It is the contention of the relator that no acceptance of the proposed resignation was necessary, and that the office became vacant upon the mere presentation of the tendered resignation to the council. Upon the other hand, the respondent contends that an acceptance was necessary, and that in its absence there was no vacancy. The authorities cited in the respective briefs are in conflict. We have also made further investigation with the same result. The relator cites *United States v. Wright*, 1 McLean (U. S.) 509. In the opinion in that case the following expression is found:

"There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president"

The above expression has been criticized in subsequent decisions, for the reason that it was not necessary to the decision, inasmuch as the letter of resignation expressed a willingness to serve until a successor could be appointed, and the officer did so serve. The decision was an early one, it having been rendered by the circuit court of the United States in 1839, and by reason of the said quoted expression frequent reference has been made to it. We are directed by relator to a

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partial quotation from §352, McCrary on Elections, which is to the effect that, when a written resignation has been sent to the governor, it is not necessary that the governor shall signify his acceptance, of the resignation to make it valid, the tenure of office not depending upon the will of the executive but of the incumbent. In support of the textwriter's statement, *United States v. Wright, supra*, is cited, together with other cases to which we shall now refer. The case of *People v. Porter*, 6 Cal. 26, is quite similar to the case at bar. The written resignation of a county judge was received by the governor on the 24th of August, to take effect September 1. No action was taken by the governor until the 8th day of September following, when he appointed a successor. Meantime the fact of the tendered resignation having become known through the newspapers, the board of supervisors of the county ordered an election to fill the vacancy supposed to exist. The election was held September 5, and the elected person then sought possession of the office from the governor's appointee who was appointed three days after the election. The appointee resisted the claim, on the ground that there was no vacancy at the time the election occurred, and that the vacancy did not occur until September 8, when the governor accepted the resignation and appointed the successor. It was said in the opinion that the resignation became effective September 1, without any action on the part of the governor. The statement appears to have been made upon the sole authority of what was said in *United States v. Wright, supra*. The case was, however, determined in favor of the appointee in possession of the office, on the ground that the election was a nullity for want of sufficient notice. Under the theory of the decision it therefore seems to have been unnecessary to say what was said about the necessity of accepting a resignation, and under all these circumstances we are not disposed to give the opinion much weight as bearing upon the subject now before us.

The next case cited is *Gates v. Delaware County*, 12 Iowa 405. The opinion in that case declares, without referring to any authority, that an officer has a right to lay down his office whether the officer, to whom the resignation must be presented consents or not; yet in the opinion it was stated that the county judge, who was such officer in that instance, had actually accepted the resignation of the county superintendent. As a decision the opinion is therefore entitled to no weight upon the subject in hand. In *State ex rel. Nourse v. Clarke*, 3 Nev. 566, it was held that one holding a civil office under the United States may resign without the consent of the appointing power, and the holding was on the authority of *United States v. Wright, supra*, and *People v. Porter, supra*. A similar holding was made in *State ex rel. Williams v. Fitts*, 49 Ala. 402, and the decision was apparently made upon the authority of *State ex rel. Nourse v. Clarke, supra*, and *People v. Porter, supra*. The case of *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 338, is also cited, but in that case it was said that a prospective resignation may be withdrawn at any time before it is accepted, thus recognizing that a resignation is not complete so as to create a vacancy until it has been accepted. The several decisions above noticed are all that are cited in support of the statement in McCrary on Elections, to which reference was above made. Through the relator and also through our own investigation, the following further decisions have been called to our attention:

State ex rel. Roberts v. The Mayor, 4 Neb. 260, holds that the acceptance by the mayor of the resignation of a city engineer is not necessary to create a vacancy. The decision is on the authority of *United States v. Wright, supra*, and *People v. Porter, supra*. In the case of *Olmsted v. Dennis*, 77 N. Y. 378, it was held that the resignation of a drainage commissioner was complete when it was received by the county judge, and that no formal acceptance was needed to give it effect. In the case of *Reiter v. State ex rel. Durrell*, 51 Ohio

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St. 74, 23 L. R. A. 681, the holding was similar, chiefly on the authority of the cases above cited.

The relator began his argument on the authority of *United States v. Wright, supra*, and we have seen that his quotation from the text of McCrary on Elections was based upon that case and others which approved what was said in that case upon a subject which was not decisive of the case. The same section 352, of McCrary on Elections (4th ed.), concludes as follows:

"This, however, was not the rule at the common law, by which an office was regarded as a burden which the appointee was bound in the interest of good government to bear, and which he was not allowed to lay down without the consent of the appointing power. The supreme court of the United States has recently said that 'In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some states with regard to offices in general, may have obtained; but we must assume that the common law rule prevails unless the contrary be shown.'"

The quotations which the above text writer makes from the supreme court of the United States, was taken from the opinion in *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314. That decision was rendered in the year 1880, after most of the decisions to which reference has heretofore been made were rendered. The opinion is an able and exhaustive one upon the subject now before us, in which it was held that the common law rule which requires the acceptance of a resignation in order to create a vacancy, is in force unless the rule has been discarded by statute. The reasons for the rule, as being founded in sound public policy, are well stated. Some of the decisions we have noticed above, including what seems to have been the pioneer case of *United States v. Wright*, are criticized in the opinion. Among other things the court said:

"As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization

would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. . . . This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. 'To complete a resignation,' says Mr. Willcock, 'it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant.' . . . And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every officeholder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law."

The decision in the *Edwards* case was cited and followed in the following cases: *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 33 N. E. 849, 36 Am. St. 514, *State ex rel. Toepke v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Clark v. Board of Education*, 112 Mich. 656, 71 N. W. 177; *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148. The following further authorities also support the rule that a resignation must be accepted in order to complete it and effect the vacancy. *State ex rel. Reeves v. Ferguson*, 31 N. J. L. 107; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *Steel v. Commonwealth*, 18 Pa. St. 451.

We believe the decided weight of authority supports the rule that an acceptance of a resignation is necessary in order

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to relieve an officer of responsibility and to create a vacancy. Under the decision in the *Edwards* case, such must be the rule where the common law in that regard has not been changed by a statute. We regard that decision as an authority we should follow, unless the common law rule has been clearly changed by statute in this state. The relator calls our attention to Bal. Code, § 567 (P. C. § 2871), in which the following appears:

“If any justice of the peace shall die, resign, or remove out of the precinct for which he may be elected, or his term of office be in any other manner terminated, the docket, books, records, and papers appertaining to his office, or relating to any suit, matter, or controversy committed to him in his official capacity, shall be delivered to the nearest justice in the precinct. . . .”

It is argued that the right of a justice of the peace to resign without an acceptance of his resignation is recognized by the above statute. We are not able to so read it. It simply directs what shall be done with his books and papers after the resignation of a justice has become effective. We are also referred to Bal. Code, § 1548 (P. C. § 4787), which provides, among other things, as follows:

“Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officers: 1. The death of the incumbent; 2. His resignation; 3. His removal. . . .”

We see nothing in the above which changes the common law rule. It is true, it is declared that an office shall become vacant upon the resignation of the incumbent; but nothing is said about the method of effecting a resignation. The silence of the statute in that regard should be construed to mean that the established common law method still obtains, and that a resignation is not complete until it has been accepted by the appointing power. Our attention has not been called to any other statutes which the relator claims have effected a change in the common law rule. In the absence of

a clear statutory declaration of a purpose to change the rule, it should not be held that it has been changed. The long-standing rule is wholesome. It insures a continuous responsible incumbent in an office. One may not lightly throw aside responsibilities which he has assumed and leave the public without an official, when some possible emergency might make the existence of a qualified officer of great importance.

We think the court did not err in sustaining the demurrer, and the judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

[No. 6630. Decided July 26, 1907.]

THOMAS LECHMAN, *Appellant*, v. J. L. MILLS *et al.*,
Respondents.¹

EASEMENTS—BY PRESCRIPTION—PAROL GRANT—LICENSE. Verbal authority to conduct and impound water for a water power, granted by the occupant of land under agreement to make a deed upon acquiring title, in consideration of the grantee's constructing and operating a sawmill on his adjoining land, is more than a revocable license, and amounts to an easement by prescription, where the grantor acquiesced in the incurring of expense and in such use of the land for twenty-five years.

SAME—PRESUMPTIONS—ADVERSE POSSESSION. The continued use of a canal for 25 years across the lands of another for a water power for extensive mills on adjoining land is presumed to be adverse, until the contrary is shown.

SAME—ORAL GRANT. An easement by prescription, used under claim of right for the statutory period, is not deprived of its adverse character by reason of the fact that it was originally granted by parol.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered June 25, 1906, upon findings in favor of the defendants, after a trial on the merits before

¹Reported in 91 Pac. 11.

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the court without a jury, in an action for an injunction. Affirmed.

John B. Davidson, for appellant.

Carroll B. Graves and *J. H. McDaniel*s, for respondents.

HADLEY, C. J.—This action was brought to enjoin the defendants from keeping and maintaining a canal on and across certain lands which the plaintiff claims to own, and also from overflowing with water any portion of said lands by means of said canal together with dams or dikes. Following largely the order of statement found in the brief of respondents, we believe the following is a fair statement of the facts in the case: In the year 1879 one Briggs was the occupant, but not the owner, of the land over which this controversy exists, and which land the plaintiff now claims to own. At that time it was believed the land would be included within the limits of the grant to the Northern Pacific Railway Company when those limits should be determined by the adoption of the line of definite location of the road, such adoption not then having been made. Briggs expected to purchase the land from the railroad company as soon as the latter acquired the title and was in position to make a sale and conveyance. But the land was then a part of the public domain, and Briggs was a mere occupant. While such was the situation, Mr. Mills, one of the defendants in this action, constructed a water ditch and pond on part of said land to serve the purposes of power for the operation of a sawmill. The ditch led from the Yakima river down to a depression upon the land now claimed by the plaintiff, and by means of dikes and dams, together with the natural topography of the ground, the water was impounded in a lake or pond, a part of the land so flooded being a part of the land now claimed by the plaintiff. The lower end of the pond was upon land owned by Mills, and the water which flowed into the pond was released through an outlet upon the land of Mills. Mills also constructed a saw-

mill, and the water so impounded developed the power for the operation of the mill.

Prior to the construction of the ditch, reservoir, and mill, said Mills entered into an agreement with Briggs, the real nature of which is in issue. The plaintiff contends that it was a mere permission or revocable license to Mills to construct and maintain the ditch and reservoir. The defendants contend, and the trial court found, that it was a verbal grant from Briggs to Mills of the right to construct and maintain said works upon the land. It is not disputed that Briggs at that time, and as a part of the agreement, undertook and promised to execute a deed as soon as he should obtain title from the railroad company. But the plaintiff claims that Briggs, in making the agreement, did not intend to give a deed without first being paid a further consideration in money, no amount being stated but the amount to be subsequently fixed by further agreement. The defendants contend that this verbal agreement contemplated, so far as a verbal agreement could, an absolute and perpetual grant. Mills has continued to operate his sawmill by means of the water so stored from the time of said construction up to the present time. In 1882 he granted to Hutchinson and Dreisner a one-half interest in the said power for the purpose of operating a flour mill, which was then by them erected. The said flour mill, together with the said conveyed interest in the water power, has by mesne conveyances passed to the defendants Kendall and Mack. The Northern Pacific Railway Company deeded the land to Briggs in 1887, and he continued to own and occupy all of the land except that occupied by the canal and reservoir, until October, 1898. During all of said time the defendants and their predecessors in interest continued to maintain the canal and reservoir, and to impound the water therein, and to utilize the power for the operation of said mill plants. In October, 1898, Briggs executed to the Sullivan Savings Institution an instrument in the form of a deed purporting to convey to said grantee the title to said land. The plaintiff derives his

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title through said Sullivan Savings Institution. This action was brought in January, 1906, to enjoin the defendants, as aforesaid, from further maintaining the ditch and reservoir. The cause was tried before the court without a jury, and judgment was rendered for the defendants, to the effect that they have a perpetual easement against the plaintiff and all persons claiming or to claim through or under him. The plaintiff has appealed.

Finding No. 2, as entered by the court, is as follows:

"That just prior to the construction of said works the said defendant Mills entered into an agreement with one Wilken Briggs, who was then the occupant of the land hereinabove described which land is claimed by the plaintiff, wherein and whereby the said Mills undertook and agreed to construct said canal, dams, reservoir and saw-mill, and the said Wilkin Briggs, in consideration of said undertaking and agreement of said J. L. Mills, gave and granted to said J. L. Mills verbally a perpetual right of way over and upon said land for said canal, ditch and reservoir, together with the right to construct and forever maintain said canal, ditch, reservoir and dams upon said land and to convey said water through said ditch or canal into said reservoir and to impound said water in said reservoir and overflow the land occupied by said reservoir in order to make the required head of water for the operation of the mills that were to be run by said power. That at that time the said Wilkin Briggs had no title to the land now claimed by the plaintiff but the same was then a part of the public domain of the United States, but it was then supposed that the same would be included within or covered by the land grant to the Northern Pacific Railroad Company as soon as the route of said company's railroad should be definitely located through said county, and the said Wilkin Briggs then expected to eventually purchase said land from said company. And at the time of said verbal agreement between the said Wilkin Briggs and the said J. L. Mills the said Briggs verbally agreed to execute and deliver to the said J. L. Mills a deed evidencing said grant of said right of way and easement upon the demand of said J. L. Mills as soon as the said Briggs himself received a deed to said land; and the said Briggs then and there waived any and all other or further

compensation on account of the construction and maintenance of said works and for the overflowing of said land."

It was further found that Mills thereafter constructed said works and sawmill and entered into the enjoyment of the easement and of the rights thus verbally granted to him, openly, notoriously, and adversely as against Briggs and all other persons, under claim of right, and with the full knowledge and acquiescence of Briggs; that all of said construction was made in reliance upon, and on the faith of, the easement so granted and of the right to construct and perpetually maintain said works and conduct water through said canal and impound the same, at an expense of \$10,000, all of which was known to Briggs who, during all the time of his occupancy acquiesced in the claim of Mills and never disputed or denied it; that the grantees of Mills, who held the flouring-mill power, in like manner relied upon the right to perpetually use said water and power and perpetually maintain the reservoir, and by reason thereof they constructed their flour mill at an expense of \$8,000, all of which was known to Briggs during the time of his occupancy and claim of title to any of said land, and he never denied or disputed said rights, but always acquiesced therein. Errors are assigned upon the findings, but we think they are sustained by the evidence.

The findings establish that the agreement made by Briggs with Mills was not a mere revocable license or permission to occupy, but that it was intended to operate as a grant to be confirmed by deed when Briggs acquired the title so that he could convey it. We believe it is unnecessary to discuss the testimony in detail, since we are satisfied that it establishes the intention to make an absolute grant, the consideration of which was the construction and operation of the mill at that place. The use of the premises was thus initiated, and it continued uninterruptedly for more than twenty-five years, until this suit was brought. Such use must now be presumed to

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have been adverse, unless it is explained to have been otherwise.

"Where the use of an easement has continued for the prescriptive period unexplained, it will be presumed to have been adverse, unless it is of such a character, or the circumstances attending it are such, as to show that it was a mere privilege enjoyed by leave of the landowner." 22 Am. & Eng. Ency. Law (2d ed.), p. 1202.

Moreover, the use was not deprived of its adverse character or rendered merely permissive for the purposes of the statute of limitations by a showing that it was preceded by an oral agreement amounting in terms to a grant, but void under the statute of limitations.

"It is generally agreed that use of an easement under claim of right by virtue of a parol grant, may be adverse so as to give a title by prescription, although the parol grant itself is void under the statute of frauds." 22 Am. & Eng. Ency. Law (2d ed.), p. 1198, and cases cited.

The following from the opinion in *Coventon v. Seufert*, 23 Ore. 548, 32 Pac. 508, may also be set forth as pertinent to this subject:

"An easement cannot be granted by parol; yet, if Mr. Simpson purchased from Mr. Jackson the right to use the ditch, and used the same for ten years, and such use was acquiesced in by Mr. Jackson and his grantees, it would be such an exercise of the easement, under a claim of right, as to give a prescriptive right to the same. It is no objection to granting an easement by prescription that the same was originally granted or bargained for by parol. That the use began by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period under a claim of right on the part of Mr. Simpson and his heirs, and their grantees. If the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right: Gould, Waters, § 338; Washburn, Easem. 2 ed. 127. The plaintiffs have used the ditch as if it had been legally conveyed to them,—that is, they have exercised such acts of ownership over it as a man would over his own property,—and the court

must presume, in the absence of any evidence to the contrary, that the settlement was a parol consent or transfer by Mr. Jackson to Mr. Simpson of the right to use the ditch, and hence it was a use as of right."

The facts in this case clearly show a continuous adverse use by respondents and their grantors under claim of right for more than a quarter of a century. This establishes their title by prescription, and we find it unnecessary to discuss other reasons suggested in support of their title.

Appellant claims a reversal in any event, on the ground that the decree is too broad inasmuch as it quiets the title to all the land covered by water from the canal, dams, and reservoir, as the same existed at the time of the decree. It is argued that there was no attempt in the pleadings or evidence to define the boundaries or to ascertain with any degree of exactness the extent of the user by respondents. We are unable to see any merit in this contention. The decree is limited to the "reservoir, dams, and dikes, as the same are at present maintained over and upon the land of the plaintiff." There is no suggestion in the record anywhere that the area involved is not the same that it has been during all the years, and no suggestion to the contrary having been made in the court below, and the cause evidently having been tried throughout upon that theory, we find no error in the particular mentioned.

The judgment is affirmed.

CROW, MOUNT, and FULLERTON, JJ., concur.

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[No. 6640. Decided July 26, 1907.]

M. FRANCIS KANE *et al.*, *Appellants*, v. A. A. JONES *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. Findings will not be disturbed on appeal where they are amply sustained by the evidence.

VENDOR AND PURCHASER—CONTRACT OF SALE—PERFORMANCE—FORFEITURE. Where a contract of purchase required the vendee to examine the abstract within five days, and if not acceptable, to notify the vendor of the defects, who was to have thirty days to cure the same, with the right to declare a forfeiture for nonperformance, a vendee who accepted the title and went into possession, and made no objection for twenty-three days, and then, upon a further installment falling due, gave notice that the title was defective and demanded return of his money without asking that the defects be cured, cannot recover installments paid after the same were declared forfeited by the vendee.

Appeal from a judgment of the superior court for King county, Morris, J., entered September 20, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover installments paid on a contract to purchase real property. Affirmed.

James C. Moody, for appellants.

Douglas, Lane & Douglas, for respondents.

HADLEY, C. J.—This action was brought to recover the sum of \$1,000, paid by the plaintiffs as a part of the purchase price of real estate. The agreement of purchase, as alleged in the amended complaint, was that the selling price was \$15,000, to be paid as follows: Cash in hand, \$250; upon the delivery to plaintiffs of an abstract of title brought down to date, \$750; thirty days thereafter, \$4,000, and within six months, \$3,000; the plaintiffs also to assume the payment of a mortgage of \$7,000. It is also alleged that,

¹Reported in 91 Pac. 2.

in the event the abstract of title agreed to be furnished should not show good and sufficient title to the premises, then upon notification of such fact, the defendants were to have thirty days within which to cure any defect that might appear; and should they fail or refuse so to do, then the defendants should refund all sums of money paid; that in pursuance of the agreement, which was made February 24, 1906, the plaintiffs on said day paid \$250, and thereafter, upon February 27, 1906, when the abstract of title was delivered to them, the further sum of \$750 was paid; that thereupon the abstract of title was examined, with the result that it disclosed that the defendants did not have good and sufficient title; that plaintiffs served upon defendants a notice in writing requesting them to correct the defects in the title, which they refused to do, and that, after thirty days had elapsed, they demanded the return of the \$1,000 paid, which was also refused.

The defendants deny that the title was defective. Their version of the transaction as to the details of payments is substantially the same as that of the plaintiffs, but they claim the benefit of the terms of a written contract which they delivered to plaintiffs and which was by the latter accepted; that contract provided that the plaintiffs should be allowed five days for examination of the abstract after it should be furnished by the defendants. It also embodied the terms for payments heretofore stated, and provided that the plaintiffs agreed to complete the purchase in the manner and upon the terms stated; also that, in case of their failure so to do, the money paid should, at the option of defendants, be forfeited as liquidated damages. It was also provided that the defendants should return to the plaintiffs the money paid if they should fail to deliver an abstract showing good and sufficient title within thirty days from the date of the contract, unless the defendants should correct any flaws that might be discovered affecting the title, within thirty days' time after the abstract should be examined, and after they should be notified

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of the defects. For plaintiffs' alleged failure to comply with the terms of the contract, the defendants declared a forfeiture of the \$1,000 paid as liquidated damages. The cause was tried before the court without a jury, resulting in a judgment for the defendants, from which the plaintiffs have appealed.

The assignments of error all relate to findings of the court. The court found the terms of the contract as to the payments as before stated, that an abstract showing good and sufficient title to the property was to be delivered to appellants and five days allowed for examination thereof; that appellants agreed to complete the purchase upon the said terms, and that in case of their failure so to do, the earnest money paid by them upon the purchase price should be forfeited to the respondents as liquidated damages; that \$250 was paid on February 24, 1906, and on February 27, an abstract was delivered to appellants; that on the 28th day of February appellants made a further payment of \$750; that the appellants accepted the title from respondents, entered into possession of the property, and accepted the contract of purchase delivered to them by the respondents. It was further found that the respondents were the owners in fee simple of the property; that not until the 22d of March, 1906, which was just prior to the time for making a payment of \$4,000 under the terms of the contract and long after the expiration of the five days within which the abstract was to be examined after its delivery, did the appellants make objections to the title; that they made no objections to the title within the five days agreed upon by the parties; that respondents demanded payment of said \$4,000 according to the terms of the contract, and that subsequently, upon appellants' failure to make the payment, respondents notified them of their forfeiture of the payments made under the contract; that respondents tendered appellants, according to the contract, a good and sufficient marketable title, and performed the contract in all things by them to be performed, but that the ap-

pellants violated the terms of the contract by refusing to make the payments as therein provided.

There was ample evidence to sustain all the findings, and under the evidence before us we shall not disturb them. It seems very clear from the evidence that the five-day provision for the examination of the abstract was as definite a condition as any of those relating to payments. That provision not only placed upon appellants the obligation to examine the abstract and discover their objections to the title within five days, but required them to promptly make known their objections, and respondents could then have thirty days from such notification to cure any actual defects in the title. Appellants not only failed to do this within the five days, but waited twenty-three days and even made the payment of \$750 one day after they had possession of the abstract. When the objection to the title was thus tardily made, no request was made of respondents that they correct the title in the particulars wherein it was criticised, and as they had the contract right to do within thirty days from the notification, but the appellants demanded the return of the \$1,000 paid and the cancellation of the contract. Under the terms of the contract they had not the right to then make such a demand, for the reason that they were in default in making their objections, and they were also required to give respondents an opportunity to correct the title. Moreover, we think the evidence was sufficient to sustain the finding that respondents were the owners in fee simple. The appellants made default in their payments, and respondents had the clear right under the contract to declare a forfeiture of the money theretofore paid.

The judgment is affirmed.

FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 6722. Decided July 26, 1907.]

FIREMAN'S FUND INSURANCE COMPANY, *Respondent*, v.
NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.¹

RAILROADS—FIRES—ACTION—EVIDENCE—SUFFICIENCY. In an action against a railroad company for damages from fire, which burned standing wheat adjoining the right of way, the evidence is sufficient to show negligence on the part of the railroad company where it appears that, in the dry season in August, it permitted much dry grass four or five inches high to stand upon the right of way, and that the fire originated there shortly after a train had passed, and immediately spread to the wheat field.

TRIAL—INSTRUCTIONS. Instructions must be considered as a whole, and are not erroneous if no confusion would then arise in the minds of the jurors.

APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR—RAILROADS—FIRES—INSTRUCTIONS. In an action for damages from a fire alleged to have been set out through negligence in allowing combustible material on the right of way and the use of a defective locomotive, the defendant cannot claim reversible error in instructing the jury on the subject of defective appliances within the issues, although the same had been eliminated by concession at the trial, where the appellant, over respondent's objection, had introduced much testimony on the subject.

RAILROADS—FIRES—NEGLIGENCE—LIABILITY. A railroad company is liable for damages resulting from a fire originating from sparks set out by passing trains on the right of way, where it failed to use reasonable care to keep the right of way free from combustible material, although there was no negligence in the equipment and operation of the locomotive.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered December 13, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover damages from fire starting on a railroad right of way. Affirmed.

Edward J. Cannon, for appellant.

H. N. Martin and *O. C. Moore*, for respondent.

¹Reported in 91 Pac. 13.

HADLEY, C. J.—This action was brought to recover damages on account of the destruction by fire of standing wheat in an open field. One Nichols was the owner of the wheat, and the field adjoins the right of way of the Northern Pacific Railway Company. The complaint alleges that the fire was due to the negligence of the railway company. The suit was brought by the Fireman's Fund Insurance Company against the railway company, and said Nichols was also joined as a party plaintiff. The insurance company had, prior to the fire, issued a policy of insurance to Nichols to protect him against loss by fire in the wheat. After the fire the loss was adjusted, and the insurance company paid Nichols \$322.57 on account of the loss. The insurance company, claiming that it is entitled to be reimbursed by right of subrogation, then brought this suit against the railway company. At the trial any claim in favor of Nichols was dismissed. The complaint charged negligence of the defendant in permitting a large amount of dry, combustible material to accumulate on its right of way at the point where the right of way adjoins the premises of Nichols; also that the locomotive appliances were defective, and that sparks were, by reason thereof, permitted to escape, causing the fire. Negligence was denied. The cause was tried before a jury, and a verdict was returned against the railway company for the exact sum which the plaintiff company paid Nichols on account of said loss. Judgment was entered in accordance with the verdict, and, the defendant's motion for new trial having been denied, it has appealed.

Appellant first assigns error in that judgment was entered against it and that its motion for a new trial was denied. It is argued that the evidence is insufficient to sustain the verdict. We think this contention is not well taken. The evidence showed that much dry grass, from four to five inches in height, was permitted to stand upon the right of way at the place where witnesses testified the fire started, and from which it immediately spread into the adjoining wheat field

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where the damage was done. The fire occurred in August, and the testimony showed that the grass was very dry. It was also shown that the fire sprang up very soon after one of appellant's trains had passed the spot at which, it is claimed, the fire began, the spot being on the right of way near the track. We think there was sufficient evidence to sustain the verdict.

Error is urged upon the following, which was the concluding sentence of an instruction given by the court:

"If you do not find the defendant railway company, through its officers or agents, was the cause of that fire, then you should find for the defendants."

It is argued that the above in effect stated to the jury that, if the railway company started the fire, it is liable, no matter what the circumstances were or what degree of care it exercised, whereas it was required by the law to exercise only reasonable care. We think no such inference could have been drawn when the instructions given the jury were considered together, as we have frequently held they must be. They were clearly instructed that the railway company was required to exercise reasonable care. That they understood such to be the standard and test of appellant's liability we think there can be no doubt. The same comment is applicable to assignment of error No. 4, which relates to another instruction. It is also argued that some of the instructions are inconsistent, but we are satisfied that, when they were read and considered as a whole, no confusion could have arisen in the minds of the jurors.

It is next contended that the court by its instructions submitted questions to the jury which were not within the issues. It is insisted that all questions of negligence touching any defective condition of the engine and its appliances were eliminated from the case, and that the only matter of negligence left for the consideration of the jury was that relating to the accumulation of dry and combustible material upon the right of way. The matter of negligence in the use of defec-

We find no prejudicial error in the record, and the judgment is affirmed.

ROOT, MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 6694. Decided July 26, 1907.]

SPOKANE VALLEY LAND AND WATER COMPANY, *Appellant*,
v. R. MADSON *et al.*, *Respondents*.¹

APPEAL—DECISION—LAW OF CASE—JUDGMENT—RES JUDICATA—ISSUES CONCLUDED. Where, upon an appeal, it is held that the vested rights of a littoral owner on a navigable lake were not affected by the adoption of the constitution and can be acquired only by the right of eminent domain, and an injunction was granted unless such proceedings be commenced, the decision is the law of the case, and on appeal from the subsequent condemnation proceeding between the same parties, it cannot be claimed that the owner of the property had no littoral rights by reason of the act of Congress of March 3, 1877, providing that surplus waters should remain free for the use of public irrigation; since such contention might have been raised in the prior suit.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 23, 1906, upon the verdict of a jury, awarding damages occasioned to defendants through condemning and appropriating the waters of a lake. Affirmed.

Happy & Hindman and Allen & Allen, for appellant.
Gallagher & Thayer, for respondents.

ROOT, J.—This case was before the court once before and may be found reported in *Madson v. Spokane Valley Land etc. Co.*, 40 Wash. 414, 82 Pac. 718. The present appeal is from a judgment of the superior court awarding respondents damages, occasioned by appellant in condemning and appropriating the waters of a nonnavigable arm of Liberty lake.

¹Reported in 91 Pac. 1.

The appellant contends that, inasmuch as the lands of respondents affected herein were acquired from the government subsequent to the act of Congress approved March 3, 1877, the owners of said lands have no littoral or riparian rights in the waters of the arm of the lake in question. The act of Congress provides, among other things, as follows:

“And all surplus water, over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.”

Appellant sustains its contention by an elaborate and able argument which would appeal with much force to the writer of this opinion were the question properly before the court at this time. But, in view of the former adjudication between these same parties relative to the same subject-matter, we are constrained to hold that this question is not now before us. It could have been (but was not) presented when the case was here before. The decision announced at that time must, for the purposes of the present hearing, be deemed binding as between the parties. The judgment from which this appeal is taken is based upon the verdict of a jury summoned to hear evidence and pass upon the question of damages. Certain errors are assigned upon the giving and refusal of instructions by the trial court. These all appear to turn upon the question just adverted to, or upon others which were, or should have been submitted at the former hearing. The jury having been properly instructed in accordance with the law of the case as theretofore announced by this court, we must hold the exceptions not well taken.

The judgment is affirmed.

HADLEY, C. J., MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 6708. Decided July 26, 1907.]

MARIE HAB, *Respondent*, v. THE CITY OF GEORGETOWN,
Appellant.¹

HIGHWAYS—LOCATION—WIDTH OF ROAD—NOTICE. Under Code of 1881, § 2971, providing that all county roads shall be sixty feet in width unless, on the prayer of the petitioners, the county commissioners shall determine on a less width, the commissioners have power to fix a less width upon the prayer of any of the petitioners at the hearing, without giving any new notice, as the law did not require the notice to state the width petitioned for.

SAME. Upon a prayer by petitioners for a county road, to fix the width at thirty feet, under Code 1881, § 2971, the county commissioners have a discretion to determine upon a width of forty feet.

SAME—COMPENSATION—WAIVER—EMINENT DOMAIN. A petition to the county commissioners by an abutting owner to open a forty-foot county road to the width of sixty feet, does not grant the right to take his abutting property without compensation.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 10, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to restrain a city from taking property for street purposes. Affirmed.

I. H. Randolph and Wilson & Thorgrimson, for appellant.
Smith & Cole, for respondent.

MOUNT, J.—This action was brought to enjoin the city of Georgetown from taking a strip of land, fifteen feet wide, from respondent's property for street purposes. The trial court decreed five feet of the land in dispute to the appellant as a public highway, but enjoined the appellant from taking the remaining ten feet. The city appeals from that part of the decree which restrains it from using the ten feet of respondent's property for highway purposes.

¹Reported in 91 Pac. 10.

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The material facts, as agreed to by the parties, are, in substance, as follows: In the year 1863, a county road sixty feet wide leading in a southerly direction from Seattle, passing respondent's property, to a point on the Duwamish river, was established, laid out, and opened by the board of county commissioners of King county. Since that time the center line of the road has been continuously used and maintained at public expense. The location of the center line of the road has not been changed in front of respondent's property. On February 4, 1879, a petition was filed with the county commissioners asking for a review and relocation of this road. The petition was granted, viewers appointed, and notice given, as required by law therefor. On May 3, 1879, the viewers' report was filed. Two days later a petition was filed by certain of the petitioners for the relocation of the road, requesting the county commissioners to fix the width of the relocated road at thirty feet along certain portions thereof. The commissioners on that day, May 5, 1879, entered an order relocating the road as petitioned for, but fixed the width thereof at forty feet, and directed the road to be laid out and opened, which was done by the county surveyor, and the road, as so laid out and opened, was approved by the county commissioners on May 16, 1879. Thereafter the property owners about the point in question fenced up their property by placing their fences on the lines of their lots as platted, which left only thirty feet of the road open to the public, and this thirty feet of road has been used by the public since that time. The fences have encroached upon the road for a distance of five feet for about thirteen years. Respondent, during that time, had occupied this portion of the street with certain sheds. On February 5, 1906, a petition was filed praying the city council of Georgetown, which was incorporated long after the road was established, as aforesaid, by the county of King, to open the highway to the width of sixty feet. The respondent signed said petition. Thereafter the city removed the fences and sheds owned by respondent, and was about to

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occupy the premises of respondent to the extent of thirty feet from the center line of the road; whereupon this action was begun to restrain the city from taking more than fifteen feet from the center line of the road.

The appellant contends that the petition requesting the county commissioners to fix the width of the road at thirty feet, and the order of the commissioners fixing the width thereof at forty feet, were void because no notice was given. It is conceded that proper notice of the relocation of the road was given as required by law, and that the petition was silent as to the width of the road. The statute then in force provided that "all county roads shall be sixty feet in width, unless the county commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in width." Code of 1881, § 2979. Under this statute, where no width was fixed by order of the board of county commissioners, the statute fixed the width at sixty feet. *Sumner v. Peebles*, 5 Wash. 471, 32 Pac. 221, 1000.

Under the petition for relocation, the board of county commissioners had jurisdiction to fix the width at sixty feet. The board also had jurisdiction to fix the width at less than sixty feet, upon the prayer of the petitioners. While the record in this case does not show that the petitioners who asked to have the width fixed at thirty feet were all of the original petitioners, it does show that they were interested in the road, and no objections appear to have been made to the order as made by the county commissioners. Since the board of county commissioners had jurisdiction to act upon the petition and to grant the whole of the sixty feet, we are of the opinion that the board had power to fix the width of the road at any number of feet less than sixty, upon the prayer or request of any of the petitioners at the hearing. The statute did not require the petition or notice to state the width of the proposed road, but to state only "the place of beginning, the intermediate points, if any, and the place of termination of said road." Code of 1881, § 2971. A new notice, therefore,

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would have afforded no more information to the public than the old notice had given.

We are also of the opinion that the board of county commissioners were not bound by the prayer of the petitioners. The board having acquired jurisdiction to establish or locate the road, might use their own judgment and fix the road at such width less than sixty feet as the circumstances and facts seemed to warrant. This being so, it follows that the road laid out in 1868 was altered by the relocation of the same road in 1879, so that thereafter the road was only forty feet in width. The appellant was, therefore, not authorized to take the property of the respondent more than twenty feet from the center line of the road. The fact that the respondent, signed the petition to the city council to open a road sixty feet in width in front of her property, did not of itself grant the city the right to take any part of respondent's property without compensation.

The judgment of the trial court appears to be right, and is therefore affirmed.

HADLEY, C. J., ROOT, CROW, and FULLERTON, JJ., concur.

[No. 6749. Decided July 26, 1907.]

CHARLES W. MALONEY, *Respondent*, v. STETSON & POST
MILL COMPANY, *Appellant*.¹

CONTINUANCE—ABSENCE OF WITNESS—SUFFICIENCY OF AFFIDAVIT. It is not an abuse of discretion to deny a continuance asked for on the ground of the absence of a witness when the affidavits did not show that the same evidence could not be procured from other witnesses.

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—PUTTING DANGEROUS MACHINERY IN MOTION—WARNING. The master is liable to a servant, a hooktender, who is ordered by a sawyer, in charge of the crew and machinery, into a dangerous place between two logs, and is injured by the negligence of the sawyer in putting the ma-

¹Reported in 90 Pac. 1046.

chinery in motion so as to cause the two logs to roll together and catch the plaintiff without giving him time to escape from his dangerous position; since it was the duty of the master to keep the place safe or give warning of the operation of the machinery in time to permit the plaintiff to escape from the danger therefrom; and negligence of the sawyer in this respect is negligence of the master.

DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES. A verdict for \$4,000 for the crushing of a leg, resulting in a compound fracture of the tibia, a simple fracture of the fibula, and a present shortening of the leg, reduced by the trial court to \$3,000, is not excessive, although the injuries may not be permanent.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 29, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a hooktender in a sawmill. Affirmed.

Holcomb & Kirkpatrick and John P. Hartman, for appellant.

Walter S. Fulton, for respondent.

MOUNT, J.—Action for personal injuries. This cause was tried to the court and jury, and a verdict was returned in favor of the plaintiff for \$4,000. Subsequently, on motion for a new trial, the verdict was reduced to \$3,000, and a judgment entered for that amount. The defendant appeals, and alleges that the court erred, (1) in refusing the continuance upon motion of appellant, (2) in refusing to grant a nonsuit; (3) in giving a certain instruction; and also that the verdict is excessive. We shall consider these alleged errors in the order stated.

(1) On November 10, 1906, the cause was set for trial for December 7 of that year. On December 1, appellant filed a motion for a continuance of the trial on account of the absence of a witness from the state. The motion was denied on December 5, 1906. The affidavit in support of the motion did not show that the same evidence could not be procured

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from other witnesses. The court, therefore, did not abuse its discretion in denying the motion. *State v. Murphy*, 9 Wash. 204, 37 Pac. 420; *Maggs v. Morgan*, 30 Wash. 604, 71 Pac. 188.

(2) The facts as shown by the evidence are substantially as follows: Appellant, in January, 1906, was operating a sawmill in Seattle. Respondent at that time was employed in the mill as hooktender or deck man. He was injured about six o'clock in the evening of January 19, 1906, after he had been engaged in that particular employment only about ten hours. He had been employed about the mill in other capacities for several months. In the discharge of his duties, the respondent and all the log-deck crew, consisting of three or four other men, were under the direct supervision and control of the sawyer. Just previous to his injuries, respondent was directed by the sawyer to hook a chain around a log on the saw carriage, the object being to turn the log on the carriage by means of the chain, which was operated over a drum above by the sawyer by means of a lever. At that time another large log, some four or five feet in diameter, was lying parallel alongside of the saw carriage and three or four feet away. The log on the carriage was also a large log from two and one-half to four feet in diameter. In order to put the chain around the log on the carriage, it became necessary for the respondent to get down between these two logs and pass the chain under the log on the carriage to a fellow servant on the opposite side. After respondent had done this, the sawyer, without waiting for respondent to escape from between the logs as he was endeavoring to do, so operated the turning gear as to cause the log upon the carriage to roll from respondent until the chain holding the log became taut, when the sawyer immediately, without warning or notice to respondent and before he had time to get beyond the reach of the log, slackened the chain, which permitted the log to roll back toward respondent and against the log lying alongside of the carriage. When respondent saw what had hap-

pened and that he could not escape otherwise, he attempted to climb from between the logs by means of a rope, but his left leg was caught between the logs and crushed so that there was a compound fracture of the tibia and a simple fracture of the fibula bones. There was evidence to the effect that the sawyer was incompetent and inexperienced, and that his incompetency was known to the appellant. But in view of the conclusion we have reached on the facts as shown by the evidence, the substance of which is stated above, it is unnecessary to consider that evidence. The complaint alleged one element of negligence, as follows:

"That, as plaintiff was between said logs and in compliance with the order of said foreman and before plaintiff could reach a place of safety, said foreman negligently and carelessly and without notice or warning to the plaintiff, so operated and set in motion said log carriage as to cause the log upon it to roll from the plaintiff until the chain holding said log was taut, when said sawyer negligently and carelessly and without notice or warning to the plaintiff and before plaintiff had time to get beyond the reach of said log, caused the chain holding said log to slacken, thereby allowing said log to roll back against the person of the plaintiff, resulting in plaintiff's leg being caught between said logs causing a compound fracture of the tibia bone and a simple fracture of the fibula bone."

It is contended by the appellant that the evidence and the complaint show that the dangers which surrounded the respondent were all open, apparent, and arose in the details of the work, and that the appellant, therefore, is not liable under the rule in *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114, and *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273. It is true that one cause of the injury was the slackening of the chain, thus permitting the log to roll back against the respondent, and this act was probably a detail of the work in which the sawyer may have been the fellow servant with the respondent, and as to such act alone the respondent assumed the risk. But this act

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was not the moving cause nor the act of negligence which proximately caused the injury. The sawyer was acting as the master, for the purpose of directing the machinery into motion. He not only should have warned the respondent that he was going to put the machinery in motion in order to roll the log, but he also should have given the respondent a reasonable time to escape from his dangerous position. The duty to give the respondent a reasonable time to escape was a duty of the master, and was as important as the duty to warn. The respondent was down between the two large logs, which all concede was a dangerous place when the machinery was started, and it was the rule and custom under such circumstances for the sawyer to signify that he was going to move the machinery; and it was his duty also to wait until the servant, who was required to be between the logs, might get out of the way. When the chain was placed in position, the respondent had a right to assume that the logs would not be moved by order of the master, at least, until respondent had an opportunity to escape. He was attempting to get away, but before he was clear of danger and while he was in view of the sawyer, the sawyer, who was acting in the dual capacity of servant and master, placed the machinery in motion, thereby causing the injury.

We think the facts in this case bring it squarely within the *Dossett* case, the only difference being that in the *Dossett* case the sawyer failed to give warning that he was going to use the "nigger;" while in this case, if warning was given at all, the sawyer neglected to give respondent any time to escape. In the *O'Brien* case, *supra*, we said, at page 546:

"It was the duty of the master, then, to keep the place into which he had sent the servant reasonably safe, or to inform the servant of dangers known to the master, or which reasonably should have been known to him, and which were unknown to the servant. If the sawyer, acting in the place of the master, intended to direct another agency under his control to act in conjunction with the appellant, which agency

rendered the place dangerous, it was certainly the duty of the master to inform the servant thereof."

It follows, of course, if it is the duty of the master to warn, it is likewise his duty to wait a reasonable time for a servant to escape before placing a dangerous agency in motion. Of course, if the servant, having been warned, manifests a desire to occupy a dangerous place, and does so, and is injured, he no doubt assumes the risk. But the evidence in this case shows that the respondent was using his utmost ability to escape, and that no time was given therefor. We are satisfied that the court did not err in denying the motion for nonsuit.

(3) The court instructed the jury, in effect, that, if they found that it was the rule or custom of the sawyer to warn that he was about to start the machinery and give the hook-tender time to get to a place of safety, then in the performance of that duty the sawyer represented the master, and his failure to warn and give time for respondent to get out of danger was negligence of the master. It follows from what we have said above that this instruction was not erroneous.

Appellant next argues that the judgment is excessive, because it appears that the injury will probably not remain permanent and that the present shortening of respondent's leg may be overcome, and his earning capacity will not be diminished. These things being true, the amount fixed by the trial court seems to us to be reasonable, and we are therefore not disposed to make a further reduction in the judgment.

The judgment is therefore affirmed.

HADLEY, C. J., CROW, and FULLERTON, JJ., concur.

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Citations of Counsel.

[No. 6645. Decided July 26, 1907.]

H. CONSTANTINE *et al.*, Respondents, v. W. V. CASWELL *et al.*,
Appellants.¹

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONTRACT FOR TRADE—PERFORMANCE. Where plaintiff agreed to trade for defendant's city lots certain personal property upon which there were chattel mortgages, and agreed to secure a discharge of such mortgages, specific performance of defendant's contract to convey the lots cannot be decreed, where the plaintiff neglected to secure releases of the chattel mortgages, but allowed the personal property to be sold under foreclosure; and this would be true even if the chattel mortgage was to be discharged by substituting a real estate mortgage on the property, where plaintiff failed to meet the defendant at a time agreed upon to complete the arrangements.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 23, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance. Reversed.

Shank & Smith, for appellants, contended, *inter alia*, that respondents are not entitled to specific performance because they never tendered performance of their part of the contract. *Moody v. Spokane etc. St. R. Co.*, 5 Wash. 699, 32 Pac. 751; *Page v. Carnine*, 29 Wash. 387, 69 Pac. 1093; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910; *Meeker v. Johnson*, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Robinson v. Thoma*, 30 Wash. 129, 70 Pac. 240; *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257; *Moran & Co. v. Palmer*, 36 Wash. 684, 79 Pac. 476; 2 Warvelle, Vendors (1st ed.), p. 829, § 13. Specific performance being impossible the court should not have made a new contract for the parties. *Powell v. Dayton etc. R. Co.*, 12 Ore. 488, 8 Pac. 544; *Kinney v.*

¹Reported in 91 Pac. 7.

Hickox, 24 Neb. 167, 38 N. W. 816; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 78 Am. St. 207, 50 L. R. A. 680.

Alfred E. Parker and *Chas. McCann*, for respondents, contended, among other things, that tender of performance was waived. *Bucklin v. Hasterlik*, 155 Ill. 423, 40 N. E. 561; *Sheplar v. Green*, 96 Cal. 218, 31 Pac. 42; *Shattock v. Cunningham*, 166 Pa. St. 368, 31 Atl. 136; *Scott v. Beach*, 172 Ill. 273, 50 N. E. 196; *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057. The court did not make a new contract for the parties. *Powell v. Dayton etc. R. Co.*, 12 Ore. 488, 8 Pac. 544; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 78 Am. St. 207, 50 L. R. A. 680.

Root, J.—During August, 1905, respondents were the owners of certain livestock and farming utensils and a leasehold interest in a farm near North Bend, King county, Washington. The lease, executed by Mary M. Miller & Sons, a corporation, provided that the lessor should have a chattel mortgage upon the livestock and farm implements for unpaid rental. At this time there was \$350 due as rent and secured by said mortgage. One O. G. Fish, of Wenatchee, also held a chattel mortgage upon said personal property. Appellants were the owners of two lots in Gilman addition to the city of Seattle. Against these lots there was a judgment of record in the sum of \$44, which had been paid but not satisfied of record. There was also a lien for lumber furnished in the sum of \$10.85. During said month of August these parties were negotiating for a trade whereby respondents would exchange their leasehold interest and the livestock and farming utensils for the two city lots of appellants. There was an oral understanding between the parties, but not put in any written contract, that respondents' lessor would take a mortgage on the lots after respondents received them, and release its chattel mortgage upon the stock and farming utensils. On the 1st day of September, 1905, the negotiations

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resulted in a written contract that day made and signed by respondent H. Constantine and appellant W. V. Caswell, and it is conceded that their wives consented to said contract. This agreement, aside from formal parts and the description of the property, was as follows:

"That H. Constantine agrees to deliver all farming implements, separators, etc., hereinafter mentioned (itemized personal property) free from all debt, mortgages or incumbrances. Upon delivery of said implements, stock, etc., free from all incumbrances, W. V. Caswell agrees to deliver to H. Constantine a deed to property situated in Interbay, consisting of a house and two lots, known on the plat as lots 14 and 15, block 6, Gilman Addition to the city of Seattle, this deed to be a warranty deed, the property to be free from all debt, mortgage or incumbrances and taxes to be paid, this agreement to be null and void if either party fails to live up to the foregoing agreement."

Respondents alleged, and the court found, a verbal agreement to have been made after the written contract was executed, whereby it was understood that there was a mortgage to said Fish upon respondents' stock and farming utensils, and wherein it was alleged, among other things, that respondents were to pay and have said mortgage satisfied, and that the parties were to meet at the office of Mary M. Miller & Sons within a reasonable time to exchange papers, and that respondents were to leave certain papers with their attorney, Chas. McCann, in Seattle. Immediately after the signing of the written contract, respondent Constantine went to Wenatchee to secure the release of the mortgage held by O. G. Fish, and the parties hereto did not see each other again until after this suit was brought. Constantine agreed to at once obtain a release of the Fish mortgage, but did not do so until about six weeks after the contract was signed as aforesaid. Appellants claim that they were not notified of the release of this mortgage until after the present suit was commenced. On October 24, Constantine came to Seattle and Mr. Miller, secretary of Mary M. Miller & Sons, a corporation, tele-

phoned for Caswell to come to Seattle. The latter did so the following day. Constantine says that he went to the train and did not see Caswell alight therefrom, and then went to Miller's office and informed him that Caswell had not come. The latter, however, did arrive in the forenoon of said day, and called at Miller's office, waited awhile, and returned again at 1:30 in the afternoon, and remained several hours waiting for respondent Constantine, who did not again appear at the office. That evening Constantine met Miller upon the street and was informed that Caswell was in town. He told Miller that it was not necessary for him—Constantine—to remain, and that he had left the papers with his attorney, one McCann. Constantine and Caswell left Seattle that night without seeing each other. In the meantime appellants had gone upon the farm and done considerable work, in expectation that the deal would be closed up. Near the middle of December, Caswell received a letter from Constantine, which letter is not in evidence. To it he replied by letter of December 15, in which he tendered a return of all personal property to respondents and declared the agreement null and void, turned over the personal property to a neighbor for respondents and removed from the farm. The \$350 rental due from respondents and secured by the mortgage to the Miller Co. thereupon was not paid, and in January, 1906, the mortgage was foreclosed and the personal property sold.

The present action was brought by respondents to enforce specific performance of the contract, alleging full performance upon their part and failure and refusal to fulfill on the part of appellants. The court made findings and conclusions favorable to plaintiffs, and entered a decree directing that, upon payment by plaintiffs to defendants, or into the registry of the court for them, in the sum of \$330, the defendants should make, execute and deliver to plaintiffs a good and sufficient warranty deed for the city lots in question, and an abstract showing good title free from incumbrance, except a judgment of \$44 and a lien of \$10.85 upon the lots for

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claims found, and surrender immediate possession thereof; that there should be declared and reserved in favor of defendants a first and specific lien on said real estate in the sum of \$880; that upon execution and delivery to the plaintiffs of a deed for said real estate, the plaintiffs should pay to defendants \$880, less the cost of this action; that if the defendants should fail, neglect, or refuse to execute a conveyance of said real estate as directed for a period of ten days, a deed should be executed by the clerk of said court as commissioner. From this decree an appeal is prosecuted by defendants.

Appellants contend that the oral contract alleged in respondents' reply, and as found to have been made by paragraph six of the findings, is not sustained by the evidence. It will be noticed that the written agreement calls for the transfer of the personal property free of incumbrance. As the written contract was made upon the 1st of September, and the respondent Constantine testifies that immediately thereafter he went away and did not see the appellants again until after the bringing of this action, we fail to see how, when, or where such an oral contract could have been made subsequent to the time of the making of the written contract. We are inclined to think that whatever oral agreement or understanding there was between the parties took place at or prior to the time when the written contract was executed. It was necessary for appellants to establish this oral contract in order to recover in this action. Negotiations leading up to a written contract are ordinarily presumed to culminate in said written document. It is, however, probably unnecessary for us to pass upon the question of this oral contract.

Assuming it to have been made as contended for in the reply and as stated in the findings, we are unable to see how this would justify a conclusion that respondents are entitled to the relief granted them in the decree appealed from. Instead of directing the specific performance of the contract made by the parties, this decree directs the carrying out of an arrangement which the parties themselves did not make but which

was made for them by the court. The latter was evidently acting upon the theory that this was the nearest approach possible to the contract which the parties had made. Evidently the decree was based upon the theory that the foreclosure of the chattel mortgage upon the stock and farming utensils was chargeable to appellants, in not conveying the city lots upon which respondents were to execute a mortgage to their landlord for the unpaid rent, in lieu of the mortgage which they had outstanding upon said personal property as security for said rent. But we cannot see any legal justification for this theory. Mary M. Miller & Sons was not a party to the contract between these parties and was not the agent of either party or privy in interest with them. The respondents could have prevented the sale of the personal property under the foreclosure proceedings, by paying the amount due their landlord or perhaps by adjusting the matter otherwise. The respondents having neglected for more than six weeks to pay and secure a cancellation or a release of the Fish mortgage, and having permitted the Miller mortgage to be foreclosed upon their property, thereby becoming unable to furnish the principal part of the consideration to be paid by them for appellants' city lots, and having failed to meet appellants at the time when they were both in Seattle for the purpose of completing their arrangements, we do not believe that a showing is made that will justify the decree made by the honorable superior court.

The same is therefore reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

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Citations of Counsel.

[No. 6612. Decided August 1, 1907.]

CANADIAN BANK OF COMMERCE, *Respondent*, v. C. E.
BINGHAM, *Appellant*.¹

BANKS AND BANKING—CHECKS—PAYMENT—FORGERY—RECOVERY OF MONEY PAID. Where forged checks were cashed by another bank, the bank on which the checks were drawn may, after negligently paying the checks before discovery of the forgery, recover from such other bank the amount so paid to it, if such bank has not been placed in a worse position than it would have been in had payment of the checks been refused and prompt notice of the forgery given.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered September 8, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money paid on forged checks. Affirmed.

Smith & Brawley, for appellant, cited: *Minot v. Russ*, 156 Mass. 458, 31 N. E. 489, 32 Am. St. 472, 16 L. R. A. 510; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 31 Am. St. 403, 12 L. R. A. 492; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305; *Bank of St. Albans v. Farmers & Mechanics Bank*, 10 Vt. 141, 33 Am. Dec. 181; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. Ed. 334.

Million, Houser & Shrauger, for respondent, to the point that the paying bank could charge back its loss to its customers cashing forged paper, cited: *Selover*, Bank Collections, § 15; *Green v. Purcell Nat. Bank* (Ind. Ter.) 37

¹Reported in 91 Pac. 185.

S. W. 50; *Mayer v. Mayor of New York*, 63 N. Y. 455; *Indig v. National City Bank*, 80 N. Y. 100; *Second Nat. Bank v. Guarantee T. & S. Dep. Co.*, 206 Pa. 616, 56 Atl. 72; *Land Title & Trust Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 46 Atl. 420, 79 Am. St. 717, 50 L. R. A. 75; *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. 24, 94 Am. St. 637. The bank could recover money paid out under a mistake. *Canal Bank v. Bank of Albany*, 1 Hill. 287; *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 55 N. E. 360, 74 Am. St. 180; *National Bank of Commerce v. National Mechanics' Bank. Ass'n*, 55 N. Y. 211, 14 Am. Rep. 232; *Holly v. Missionary Society*, 180 U. S. 284, 21 Sup. Ct. 395, 45 L. Ed. 531; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *Espy v. Bank of Cincinnati*, 18 Wall. 604, 21 L. Ed. 947; *Merchants' Bank v. McIntyre*, 2 Sandf. (Sup'r. Ct.) 431; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342; *Riverside Bank v. First Nat. Bank*, 74 Fed. 276. The holder of a forged paper who received payment is liable to the paying bank regardless of indorsements. *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. 884, 6 L. R. A. 724; *Laborde v. Consolidated Ass'n*, 4 Rob. (La.) 190, 39 Am. Dec. 517.

ROOT, J.—This case was before the court once heretofore, and may be found reported in 30 Wash. 484, 71 Pac. 43, to which reference is made for a more complete statement of the facts and for a discussion and determination of most of the legal propositions presented on the present appeal. At that time the action of the lower court in sustaining a demurrer to plaintiff's complaint was held erroneous, and the case was remanded for a trial. Upon the hearing it was established that one of the forged checks in question was presented to this appellant, at his banking house at Sedro-Woolley, by some one whom none of the bank officers could recall, and cashed by appellant, the check being indorsed by the name of the payee,

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a person known to none of the officers of the bank nor to the logging company whose officers' names were upon the check, one genuine and one a forgery. The other checks involved were presented to this appellant, at his bank in Sedro-Woolley, by various business men in said town, they having cashed the same or received them in payment for goods when presented in the course of business. At the close of the evidence, the trial court made findings and conclusions in favor of the plaintiff, and rendered judgment thereupon, from which this appeal is taken.

It is contended by appellant that the evidence shows no negligence whatever upon his part, and that the negligence of the respondent, in accepting and cashing the checks when it had at hand the signatures of the logging company's officers, by an examination of which it would have detected a forgery, is sufficient to defeat respondent's action. It is urged that the statute, as well as the common law, required the respondent to know the signatures of its depositors, and that having accepted and paid the checks it cannot now recover the money. It seems to us that the holdings of the court when the case was here before are conclusive against the appellant at this time. These checks were forgeries. They never had any value. When the forger passed them, it was an act of fraud, and every one who advanced or paid money as a consideration for one of these checks did it as a result of deception, fraud, or mistake. Hence, every one who handled one of these checks and received money in consideration thereof, thereby received something for nothing. As a general proposition, money so received cannot be withheld when demanded by the party who, by fraud, misrepresentation or mistake, paid said money for something which he supposed to be of value, but which as a matter of fact and law was valueless. In the opinion handed down before, the following appears:

"Certainly the governing principle upon which the respondent [now appellant] is entitled to retain the appellant's money, if he is so entitled, is that by the action of the appel-

lant he has been prevented from recovering the money out of which he had been defrauded by the forger before the appellant had taken any action in the premises; or, stated affirmatively, that he has been prejudiced by the action of the appellant in paying the check instead of allowing it to go to protest. This is in harmony with the undisputed rule that a drawer or maker of a check, who is deceived by a forgery of his own signature, may recover the payment back, unless his mistake has placed an innocent holder of the paper in a worse position than he would have been in if the discovery of the forgery had been made on presentation, and with the rule that allows the maker of a note, who pays it over his own forged signature, to recover, from the person who received it, for money paid by mistake, unless his negligence has caused loss to an innocent purchaser. There are no arbitrary rules of law governing these cases, and none are contended for."

Under this ruling the respondent was entitled to recover, unless respondent's negligence caused a loss to this appellant. It is doubtless true that the respondent was guilty of negligence in not promptly discovering the forgery and notifying this appellant. It is also quite evident that appellant, or whosoever first cashed these forged checks, was guilty of some negligence in not having the party properly identified. But, laying aside the question of negligence as to appellant and those from whom he bought the checks, it does not appear from the pleadings and evidence in this case that the appellant suffered loss by reason of the delay or negligence of respondent. If the appellant had made a showing that, at the time he was apprised of the forgery, he was unable to collect the money which he had paid for said checks, but that he could have done so if respondent had promptly detected the forgery, as it should have done, he would doubtless have a defense to this action. But nothing of the kind appears. So far as this record shows, the appellant, when apprised of the forgery, could have recovered from each of the parties from whom he received the checks the amount of money paid therefor, or was in as good a position to have done so as he

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would have been had the respondent immediately protested the checks and notified him of the forgery.

We think the judgment of the trial court was in accord with the principles enunciated in the opinion of this court upon the former hearing. The judgment is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 6592. Decided August 1, 1907.]

C. J. ERICKSON, *Respondent*, v. F. McLELLAN & COMPANY,
Appellant.¹

PLEADING—REPLY—DEPARTURE. In an action upon a contract, where the defendant alleged failure to perform within the time limit, it is not a departure to set up in the reply a modification of the original contract as to the time limit and delay occasioned by the defendant preventing a performance within such time, which was thereby waived.

SAME—DEFECTS—OBJECTIONS. Objections to defects in pleadings cannot be raised by objection to any evidence at the trial.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 16, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon contract. Affirmed.

Piles, Howe & Farrell and *Dallas V. Halverstadt*, for appellant.

Shank & Smith, for respondent.

PER CURIAM.—The respondent brought this action against the appellant to recover the sum of \$1,542.90. In his complaint he alleged, in substance, that he had entered into a contract with the appellant by the terms of which he agreed to do certain work in improving a public street in the city of Seattle which the appellant was under contract with the city

¹Reported in 91 Pac. 249.

to do; the work consisting of certain grubbing and clearing, and excavating and filling, the first to be paid for in a lump sum, and the other at so much per cubic yard; alleging further that he had fully performed all of the terms and conditions of the contract on his part to be performed. The written contract sued on was attached to the complaint as an exhibit, and contained a condition to the effect that the respondent should have eleven months from June 1, 1904, within which to fully complete the work required under the contract, and that for each and every day that the work should remain unfinished after the required time he would pay ten dollars as liquidated damages. A certain further sum was claimed also for extra work.

The appellant in its answer admitted the execution of the contract mentioned in the complaint, and the doing of this work as therein alleged, but denied that there was any balance due, and especially denied that the appellant had performed the contract according to its terms, or that he was entitled to anything for extra work. For an affirmative defense it set out the clause in the contract requiring the work to be completed within a given time, and alleged that the respondent did not complete the work within the given time, nor for more than one hundred and thirty days thereafter. It also alleged that it had furnished the respondent with certain materials and labor which had not been paid or accounted for; further alleging that the amount due for liquidated damages and for the value of the labor and materials exceeded the respondent's demand, and prayed that the respondent's action be dismissed.

The respondent filed a reply to the affirmative defense, in which he admitted that he had not completed the work within the time prescribed in the contract, but alleged that the contract had been changed so as to include further and additional work, and for the finishing of which no time limit was fixed; also that he was further delayed by the failure of the appellant to erect a certain bulkhead which was necessary to be

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erected before the work he had contracted to do could be completed, and that the subsequent change in the contract and the failure of the appellant to erect the bulkhead, amounted to a waiver of the time limit prescribed in the written contract.

On the issues thus made, the case went to trial before the court without a jury. During the course of the trial, the respondent offered evidence tending to show an oral modification of the contract sued on in the respects set out in the reply, and that the appellant had delayed the completion of the work by its failure to erect the bulkhead. To this evidence the appellant objected, but its objection was overruled. At the conclusion of the evidence, the court found in favor of the respondent for practically the amount sought to be recovered. Judgment was entered upon the findings, and this appeal taken therefrom.

The appellant assigns error upon the ruling of the court admitting evidence of the facts pleaded in the reply, contending that the reply was a departure from the allegations of the complaint, and hence not permissible in this state under the ruling of *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335, and other cases maintaining the same doctrine. In the case cited, it was held that a plaintiff could not set up one cause of action in his complaint, and after answer abandon that cause of action and set up an entirely new one in his reply. To the same effect is *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123, where it was also held that the question could be raised by objecting to the admission of evidence, and moving for a nonsuit. But the case at bar does not fall within the rule of either of these cases. A departure in pleading takes place when, in a subsequent pleading, a party deserts the ground taken in his last antecedent pleading and resorts to another. Here there was no desertion of the cause of action set out in the complaint. The respondent was still compelled, in order to recover, to prove the principal allegations of his complaint, and the most that can be said against the pleading is that the entire cause of action is not set out in the complaint.

But to set out a part of the cause of action in the complaint and the balance in the reply is not a departure in pleading, however defective the pleading may otherwise be. Neither is it the proper remedy for such a defect to go to trial and object to the introduction of evidence. The pleading should be moved against, so that the pleader may have an opportunity to correct it without the delay and expense of taking a nonsuit and commencing his action over again. It seems to us now that such a practice would have been more in consonance with the spirit of the code had it been adopted in the cases above cited, but since we hold the case at bar does not fall within them, it is unnecessary to announce a modification of the rule. We will not, however, extend the doctrine to other cases. As no other error is assigned, it follows that the judgment appealed from must be affirmed. It is so ordered.

[No. 6768. Decided August 1, 1907.]

REBECCA VIOLA CURTIS, *Respondent*, v. FRANK M. CURTIS
et al., *Appellants*.¹

DIVORCE—CUSTODY OF CHILD—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY. Upon application of a mother for modification of a decree of divorce awarding the custody of a child to a stranger, to which she had consented owing to her then poor health, proof that she is now able to provide for the child authorizes the court to award her its custody without any showing that the welfare of the child demands the change.

SAME—FITNESS OF MOTHER. Upon application of a mother for modification of a decree of divorce, to gain possession of a child, specific acts which occurred long before her marriage, and then known to her husband, are not sufficient to show her unfitness to have custody of the child.

SAME—CONSENT TO DECREE—EFFECT—MODIFICATION. A stipulation in a divorce case as to the custody of a child amounts to no more than evidence, and does not estop the party from subsequently moving for a modification of the decree.

¹Reported in 91 Pac. 188.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 3, 1907, upon findings in favor of the plaintiff, modifying a decree of divorce and awarding to a mother the custody of a minor child. Affirmed.

Hathaway & Alston, for appellants.

J. Y. Kennedy, for respondent.

FULLERTON, J.—On May 24, 1906, in an action pending in the superior court of Snohomish county, between the respondent and the appellant Frank M. Curtis, for a divorce, the court entered a decree divorcing the parties and awarding the care and custody of their minor son, then of the age of four and one-half years, to the appellant Clara Maltby, further decreeing that the appellant Curtis pay to Mrs. Maltby the sum of \$15 per month for the maintenance of the child. On October 23 thereafter, the respondent petitioned the court for a modification of the decree to the effect that the child be taken from the custody of Mrs. Maltby and awarded to her, alleging as grounds therefor that the appellant Maltby and her husband were then engaged in running a hotel at Marysville, Washington, connected with which was a saloon which could be entered by a door opening therein from various parts of the hotel; that much drinking and carousing occurred in the saloon, which could be witnessed by the boy by merely opening one of the doors leading to the saloon, and further, that the boy was permitted to mingle promiscuously with the guests of the hotel and the patrons of the saloon. She further alleged, that at the time of the decree, she was much broken in health, owing to the cruel treatment of her husband, and consented to the decree awarding the child to Mrs. Maltby without fully understanding the effect of the same, believing that it was but temporary and that a hearing would be had before a final decree would be made relating to the permanent custody of the child. She also alleged that

she was earning lucrative wages as a cook, and by doing domestic and laundry work in the town of Index, Washington, was capable of caring for and educating the child. The appellants put in issue the allegations of the petition by answer, and a trial was had on the merits of the controversy. The trial court held that the respondent was entitled to the custody of the child, and modified the decree accordingly.

The respondent offered no evidence whatever in support of her allegation that the appellant Maltby was subjecting the child to improper influences, nor did she show or attempt to show that the child was not receiving due and proper care. She confined her proofs to the allegation that she, herself, by reason of her change in health, was then able to support and educate the child and was a proper and fit person to have its care and custody.

It is the appellant's contention that this showing is not sufficient; that the respondent should have shown not only her own changed condition, but that the welfare of the child demanded a change in its custodian before the court was authorized to modify the original decree. But the rule is not so broad as this. It is true, this court said in *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546, that a decree of the superior court which determines the custody of infant children is conclusive upon the court which rendered the decree, and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child, but it did not mean by this that both these conditions had to occur before a change in the decree would be made. While the welfare of the child is, in all cases where the court is clothed with power of its disposition, the primary consideration, yet it is not the policy of the law to take children away from their parents and give them to strangers merely because the strangers are better provided financially to rear and educate them than are the parents. Parents are their children's natural protectors. They have an interest in them that is not shaken by acts of disobedience or ingratitude,

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and because of this interest children under their parents' immediate care, even though their surroundings be humble and their opportunities narrow, are much more apt to grow up useful men and women than they are when reared by strangers who do not have this natural affection for them. When, therefore, the parents are able to care for their children, it is the policy of the law to award their custody to them rather than to the custody of strangers.

The appellants further urge, however, that the wife is unfit morally to have the custody of the child. But we do not think the evidence establishes this fact. The specific acts of immorality charged against her, even admitting that they are proven, occurred in her earlier years long before her marriage to the appellant Curtis or the birth of the child, and were known, moreover, by him at the time of such marriage. Surely he should not be permitted to urge these as a reason for depriving her of her offspring. Nor do we think Mrs. Maltby can urge the matter. The mother's right to the child must depend on her present conduct, and we find nothing in the evidence that impugns her character for morality and decency occurring since her marriage with the appellant.

It is contended that because the respondent stipulated in the divorce that the child should be awarded to Mrs. Maltby that she cannot now question the decree. We do not think, however, that this fact has any bearing upon her right to now seek its modification. A stipulation in an action ordinarily merely takes the place of evidence. It was so here, and the decree founded thereon no more estops the parties from seeking its modification than would a decree founded upon evidence of a different character.

The order appealed from is affirmed.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

[No. 6634. Decided August 1, 1907.]

C. C. PIERCE, JUNIOR, *et al.*, *Appellants*, v. HERMAN C. PETTIT *et al.*, *Respondents*.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. In the absence of exceptions to the findings, they cannot be reviewed on appeal.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—TITLE—WAIVER—FORFEITURE OF PAYMENT. Where, before making the first payment, a purchaser of real estate knew that his contract was not with the owner, but with one who only held a contract for the land, the payment made cannot be recovered for defect in the title, where the owner was able and willing to convey, and the contract provided for forfeiture of payments made if the purchaser failed to take the property.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 16, 1906, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing an action to recover money paid on a contract to purchase real property. Affirmed.

McCafferty & Bell, for appellants.

Shank & Smith, for respondents.

HADLEY, C. J.—This is a suit to recover \$800, which was the sum paid by the plaintiffs as a part of the purchase price upon a contract to purchase real estate. The cause was tried by the court and recovery was denied. Judgment was entered dismissing the action, and the plaintiffs have appealed.

Errors are assigned upon certain of the court's findings, and considerable discussion of the evidence in reference thereto is contained in appellants' brief. The record, however, discloses no exceptions to the findings, and they are therefore not reviewable here, as we have often held. Late expressions of the court in point may be found in the following cases: *Hoe-*

¹Reported in 91 Pac. 190.

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schler v. Bascom, 44 Wash. 673, 87 Pac. 943, and *Bybee v. Bybee*, 45 Wash. 187, 87 Pac. 1122.

It is further assigned that the conclusions of law and judgment as made by the court do not follow from the findings, and also that the findings are inconsistent with each other. The court found that Pettit & Son, on January 20, 1906, gave to appellants a written receipt for \$100, as a payment upon the purchase price, the writing also containing other data concerning the terms of the purchase. It stated the aggregate purchase price as \$6,600. Eight hundred dollars was to be paid in cash and the balance in deferred payments. An abstract of title was to be furnished, and five days allowed for its examination. It was also stated that, if the title was not good and could not be made good, then the agreement should be void; but if found to be good and not accepted by the purchaser, the earnest money should be forfeited. Time was made the essence of the agreement, and it was also stated that it was made subject to the owner's approval. It was also found that the property was listed for sale with Pettit & Son by the defendant Perry.

The foregoing was found with reference to what took place on January 20, and it was further found that on January 22 said Perry contracted to sell the property to the appellants by a written contract of sale executed and delivered on that date; that the further sum of \$700 was then paid, completing the first payment of \$800. The terms of sale were set forth in the contract as in the memorandum of January 20. The lots were owned by one William Pigott, at all times mentioned, and it was found that he was at all times ready, willing, and able to convey; that on January 15, Pigott authorized M. B. Crane & Company to sell the property, which authorization continued until after the commencement of this action; that prior to the execution of the said contract from Perry to appellants, M. B. Crane & Company executed their contract of sale to Perry, and the same was ratified by Pigott; that at the time the \$100 was paid and the memorandum receipt given,

on January 20, the appellants understood, and it was so represented, that Perry was the owner; but that before the execution of the contract of January 22, when the further payment of \$700 was made, appellants were apprised that Perry had only a contract to purchase from the owner. Appellants, having failed to make subsequent payments, claimed that the examination of the abstract disclosed that Perry was not the owner; that the title was not therefore good, and that appellants were for that reason released from further obligations and entitled to a return of the \$800 already paid. The same contention is made here. But it will be seen that the court found that appellants knew, when they paid the \$700 that Perry was not the owner, and that he had only a contract of sale. Whatever may have been their understanding in the first instance, they learned the facts before they completed the \$800 payment.

We find no inconsistency in the findings. When the subsequent examination of the abstract disclosed that Perry was not the owner, it merely disclosed what appellants already knew, and what they knew when they completed their contract of purchase of January 22. The disclosures of the abstract, therefore, furnished no excuse for not making the subsequent payments, since the court found that the owner was at all times ready, able, and willing to convey. Time having been made the essence of the contract and it having been provided that payments made should be forfeited in default of making other payments, it follows that appellants are not entitled to recover the payment made, and that the judgment follows from the court's findings.

The judgment is affirmed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

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Opinion Per HADLEY, C. J.

[No. 6779. Decided August 1, 1907.]

DOLLIE A. PIPER, *Appellant*, v. WILLIAM E. PIPER,
Respondent.¹

MARRIAGE—ANNULMENT—PROCESS—DIVORCE—STATUTES—TITLES. The statute providing for summons by publication against nonresidents in actions for divorce, authorizes such summons in actions for annulment of the marriage, the legislature having invariably treated the two actions as belonging to one subject and established the same practice in both; and a legislative act treating of the same together does not embrace more than one subject; annulment being germane to a title which referred only to divorce.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 29, 1907, upon sustaining an objection to the introduction of plaintiff's evidence, dismissing an action for the annulment of a marriage. Reversed.

Roche & Onstine, for appellant.

R. M. Barnhart and Carroll A. Gordon, as *Amici Curiae*.

HADLEY, C. J.—This is an action for the annulment of a marriage. The complaint alleges that the plaintiff and defendant were intermarried on the 29th day of November, 1899, and that prior to and at the time of the marriage, defendant had a wife living, his marriage to whom was still in force and effect, undissolved by decree of divorce or otherwise. Affidavit in due form was filed, showing that the defendant is a nonresident of this state, and that his residence is unknown to the plaintiff, his last-known place of residence being stated. Service of publication summons was regularly made in the usual manner. No appearance was made by the defendant, and in due time a default was claimed against him. The plaintiff offered evidence in support of her complaint, when the deputy prosecuting attorney, who appeared in behalf of

¹Reported in 91 Pac. 189.

the state, objected to the hearing of any evidence, on the ground that the action is one for the annulment of a marriage, and that service of summons by publication is not authorized in such a case. The court sustained the objection and thereupon entered judgment, dismissing the action. Plaintiff has appealed.

The sole question presented by the appeal is whether our statutes authorize service of summons by publication in an action of this character. Pierce's Code, § 335, subd. 4 (Bal. Code, § 4877), authorizes service by publication upon a non-resident defendant "when the action is for divorce in the cases prescribed by law." Appellant argues that an action for the annulment of a marriage is, in this state, of the same nature as an action for divorce, and that it has always been treated by our legislatures in the passage of statutes as in effect the same. We believe this is true. In the territorial Laws of 1854, page 405 *et seq.*, and again in the territorial Laws of 1862, page 413 *et seq.*, suits for divorce and alimony and for the annulment of marriages are treated together in the same legislative acts. The same is true of § 2000 *et seq.* of the Code of 1881, and also of a subsequent act of the state legislature found in the session Laws of 1891, page 42. The legislative designations of the above statutes are as follows: "An act regulating divorces;" "An act to regulate suits for divorce and alimony;" "An act in relation to applications for divorce, amendatory of sections 2000 . . . of the Code of 1881." Section 4632 of Pierce's Code (Bal. Code, § 5718), provides that one must reside in this state for one year before applying for a divorce, and the same section makes the same provision with regard to suits for annulment of marriage. Section 4633 (Bal. Code, § 5719), also provides that the court shall require proof in either a suit for divorce or for annulment, when there has been a failure to answer, or when the answer admits the allegations of the complaint.

It thus appears that our legislature has invariably treated actions for divorce and for the annulment of marriages as

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belonging to one general subject, and in conferring jurisdiction to grant divorces it has also been made to include the annulment of marriages. No constitutional objection can well be urged against classifying the two actions together for the reason that the subject of the annulment of marriage is germane to that of divorce, and the statutes are therefore not repugnant to the constitutional requirement that "no bill shall embrace more than one subject, and that shall be expressed in the title." That these two matters are often treated in statutes as of the same subject and as germane to each other is evident from the following:

"The word 'divorce,' as now used, means a dissolution of the bonds of matrimony, although as used in the statutes of many states, it includes both nullity and divorce . . . The jurisdiction of courts to annul marriages is usually conferred by statutes including both causes for annulment and causes for divorce, without attempt to distinguish one from the other. . . . The nullity suit, like a suit for divorce, is a proceeding to establish the status of the parties. Therefore the proceeding must be brought where the parties are domiciled. The law of domicile will be the same as in divorce proceedings." 19 Am. & Eng. Ency. Law (2d ed.), pp. 1218, 1219.

"A suit to declare a marriage null is held to be within the term 'divorce suit' in a statute of the sort we are considering." 2 Bishop, Marriage, Divorce and Separation, § 786.

The same author, at § 808 of said volume, says:

"A statute creating a jurisdiction for 'divorce' carries with it suits for nullity,—a doctrine before stated in another aspect."

In view of the not uncommon legislative policy above indicated, as well as in view of the express provisions of our statutes, we think it has been the evident intention of our legislature to establish the same jurisdiction and practice for both divorce and annulment suits. It follows that there was authority to serve the summons by publication in this action.

The judgment is therefore reversed, and the cause re-

manded with instructions to vacate the judgment of dismissal and proceed to hear the appellant's testimony.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 6163. Decided August 1, 1907.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. THE
CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — DETERMINATION—REVIEW. A determination by a city council that abutting property is benefited by a local improvement is a legislative question, not subject to review by the courts, in the absence of fraud or arbitrary action.

SAME—PROPERTY BENEFITED—RAILROAD RIGHT OF WAY. The right of way of a railroad company abutting upon a local improvement may be assessed for benefits under a statute authorizing the assessment of abutting property in proportion to its frontage on the street improved.

SAME—METHOD OF ASSESSMENT—FRONTAGE. Assessments for local improvements in proportion to the frontage of the abutting property are valid.

SAME—RIGHT TO ASSESS—VALIDITY OF LIEN. The right to levy a special assessment against a railroad right of way for local improvements is not dependent upon the question of whether a valid lien can be created against the property.

Appeal from an order of the superior court for King county, Albertson, J., entered February 17, 1906, upon findings in favor of the defendant, after a trial before the court without a jury, confirming a municipal assessment for local improvements. Affirmed.

Carroll B. Graves, for appellant. A railroad right of way, permanently devoted to that purpose, receives no benefit from local improvements contemplated by the laws relating to special assessments. *Village of River Forest v. Chicago etc. R.*

¹Reported in 91 Pac. 244.

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Co., 197 Ill. 344, 64 N. E. 364; *New York etc. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Philadelphia v. Philadelphia etc. R. Co.*, 33 Pa. St. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Boston v. Boston etc. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Detroit etc. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 58 Am. St. 466, 28 L. R. A. 798; *Chicago etc. R. Co. v. Ottumwa*, 112 Iowa 300, 83 N. W. 1074, 51 L. R. A. 763; *Chicago etc. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *Mt. Pleasant Borough v. Baltimore etc. R. Co.*, 138 Pa. St. 965, 20 Atl. 1052, 11 L. R. A. 520; *City of Allegheny v. Western Pennsylvania R. Co.*, 138 Pa. St. 375, 21 Atl. 763; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 61 Atl. 474. There is no power to enforce such an assessment. *Lake Shore etc. R. Co. v. Grand Rapids*, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195; *Southern California R. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79; *Sweeney v. Kansas City R. Co.*, 54 Mo. App. 265; *Bridgeport v. New York etc. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Connor v. Tennessee Cent. R. Co.*, 109 Fed. 931; *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L. Ed. 635; *Georgia v. Atlantic etc. R. Co.*, 3 Wood 434, Fed. Cas. No. 5,351, and other cases cited.

Scott Calhoun and *O. B. Thorgrimson*, for respondent.

CROW, J.—The city of Seattle, by ordinance 12185, created local district 1059 for the improvement of Wallingford avenue and other streets, by constructing sidewalks, and directed that a special assessment be levied against the property therein to pay the cost thereof. The district consisted of all real estate to the depth of one hundred and twenty feet abutting on each side of the streets improved. An assessment roll was prepared, filed, and notice given, in due form. Written objections made by the Northern Pacific Railway Company were overruled by the city council, and upon appeal were again overruled by the superior court of King county.

From the order of the superior court confirming the assessment, the Northern Pacific Railway Company has appealed.

The assessment was made upon all abutting property according to frontage. The trial court found that the appellant has an abutting right of way, varying from sixty to one hundred feet in width, which has been assessed; that it was acquired as a right of way, and is not used for any other purpose; that with the exception of a single track located thereon, it is vacant and unimproved; that the assessment levied is in proportion to the assessments on other lands in the district; that the appellant's land is within the limits of the city of Seattle, close to the north shore of Lake Union in a district now being used for the operation of mills and manufacturing plants; that said land is suitable for the purpose of building side tracks and spurs to reach the different mills and manufacturing plants which are now, or may hereafter be, built in such locality; that only a small portion of such right of way is used and occupied by the railroad track, and that the land will be benefited and its market value increased by the improvement. These findings are sustained by the record. The ordinance creating the district and directing an assessment upon all abutting property according to frontage, was a legislative determination by the city council that all abutting property within such district will be benefited. With perhaps occasional exceptions involving fraudulent or arbitrary action, such legislative determination does not become the subject of review by the courts, but is final. *Smith v. Worcester*, 182 Mass. 232, 65 N. E. 40, 59 L. R. A. 728; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Chicago etc. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Chicago etc. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *People ex rel. Scott. v. Pitt*, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372; *Illinois Cent. R. Co. v. People ex rel. Ashwill*, 170 Ill. 224, 48 N. E. 215. In *Prior v. Buchler & Cooney Const. Co.*, 170 Mo. 439, 451, 71 S. W. 205, the court said:

"The question of whether the plaintiffs' lots would or would not be benefited by the construction of this sewer, is

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a legislative and not a judicial question, and the municipal legislature adjudged that they would be benefited and fixed the ratio of such benefit, when it established the joint sewer district, and as there is no question of fraud or oppression of the municipal assembly in so passing such ordinance (even if such allegation would convert the question into a judicial one, as to which it is not necessary now to decide), such judgment of the assembly is conclusive."

In *Lightner v. Peoria*, 150 Ill. 80, 87, 37 N. E. 69, it is said:

"As already seen, the imposition of the tax is, of itself, a determination by the legislative authority of the city that the benefits to the contiguous property will be as great as the burden imposed. There is necessarily vested in the city council a large discretion in determining the extent of the improvement, what shall be included within it, and the nature and character of it. By the statute they are expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and unless there has been a clear abuse of the power and discretion conferred upon the city council, courts are powerless to interfere."

Judge Cooley, in his work on *Taxation* (3d ed.), vol. 2, at page 1208, says:

"It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive."

In his work on *Constitutional Limitations* (7th ed.), at page 729 *et seq.*, Judge Cooley says:

"On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district, and assess the expense of the improvement upon the lots in proportion to the frontage. Here also is apportionment by

a rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it."

The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that unless it can be affirmatively shown that some special benefit does result, no assessment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improvement of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee, and that its easement is not subject to special assessment. Although the appellant may not hold the fee simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant, is therefore, for all practical purposes, the substantial owner. The fee subject to its use and easement is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value. Appellant cites the following authorities to show that its right of way cannot be subjected to special local assessments: *River Forest v. Chicago etc. R. Co.*, 197 Ill. 344, 64 N. E. 364; *New York etc. R. Co. v. New Haven*, 42

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Conn. 279, 19 Am. Rep. 534; *Philadelphia v. Philadelphia etc. R. Co.*, 33 Pa. St. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Boston v. Boston etc. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Detroit etc. R. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 58 Am. St. 466, 28 L. R. A. 793; *Chicago etc. R. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249; *Mt. Pleasant v. Baltimore etc. R. Co.*, 138 Pa. St. 365, 20 Atl. 1052; *Allegheny v. Western Pennsylvania R. Co.*, 138 Pa. St. 375, 21 Atl. 763; *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 61 Atl. 474.

While these cases seem to be in point, there is a sharp conflict of authority on this question. We think the best-considered cases and the weight of modern authority, from which citations are hereinafter made, are opposed to appellant's contention. No citation of authority is necessary in support of the fundamental principle that the right of a municipality to levy special assessments depends on statutory enactment, and that it has no existence unless there be a valid statute conferring it. It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement. The appellant makes no contention that the assessment was not levied by regular statutory procedure; that it was not made proportionately on all lands in the district, or that any statute expressly exempts its right of way. Its position seems to be that, having shown the exclusive use of the land for a right of way, it must be conclusively presumed that it has not been benefited by the improvement, and therefore cannot be assessed at all. In other words, it does not question the amount of the assessment levied, but the validity of any assessment. This position cannot be sustained. After the proper legislative authority (in this case the city council) has by ordinance established a local improvement district, which includes all abutting property, and has directed an assessment according to frontage, the presumption is that all abutting property within such district is benefited by the

improvement without regard to the use to which it may be applied.

Subdivisions 10 and 13, of § 739, Bal. Code (P. C. § 3732), expressly grant to councils of cities of the first class legislative authority to provide for local improvements, to determine that they may be made at the expense of abutting property, and to levy assessments therefor on benefited property. The same powers are granted by subdivisions 10 and 13 of section 18 of article 4 of the charter of the city of Seattle. Subdivision 3, § 11, art. 8, of the city charter authorizes the establishment by ordinance of a local improvement district which shall embrace all property benefited by the improvement, and further provides that:

“Unless otherwise provided in such ordinance such district shall include all the property between the termini of said improvement abutting upon, adjacent or proximate to the street, lane, alley, place or square proposed to be improved, to a distance back from the marginal line thereof one hundred twenty (120) feet, and all property included within said limits of such local improvement district shall be considered and held to have a frontage upon such improvement, and *shall be the property specially benefited by such local improvement*, and shall be the property assessed to pay the cost and expense thereof, or such proportion thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited, in proportion to the frontage thereof upon such improvement.”

This provision confers on the council legislative authority to determine what property will be benefited. In this case the council have by ordinance determined that all property abutting on the improvement to a distance of one hundred and twenty feet from the line thereof, which includes the appellant's right of way, has been benefited, and has directed that the assessment be made thereon in proportion to frontage. This method of making assessments according to frontage has been held valid and constitutional by the great weight of modern authority. Elliott, Roads & Streets (2d ed.), § 559;

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2 Cooley, Taxation (3d ed.), pp. 1217, 1218, and cases cited; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; *Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Hackworth v. Ottumwa*, 114 Iowa 467, 87 N. W. 424; *Harrisburg v. McPherran*, 200 Pa. St. 343, 49 Atl. 988; *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; *King v. Portland*, 38 Ore. 402, 63 Pac. 2, 55 L. R. A. 12; *King v. Portland*, 184 U. S. 61, 22 Sup. Ct. 290, 46 L. Ed. 431.

This court, in the case of *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791, where a reassessment had been made on the front-foot basis, held such a method of assessment to be proper, and having distinguished *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, substantially as it was afterwards distinguished in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, and later cases by the supreme court of the United States, reversed the judgment of the superior court which had held the statute allowing an assessment according to frontage to be unconstitutional.

In *Sheley v. Detroit*, *supra*, Mr. Justice Cooley said:

"We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost of frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled, . . ."

As above stated, however, the theory of the appellant is that the judgment of the superior court confirming the assessment is erroneous, for the reason that, according to its contention, neither the statute nor the city charter contemplates

that its lands, which are at present used exclusively as a right of way, shall be assessed; that an assessment can be upheld only on the theory of benefits conferred equal to the assessment imposed, and that in its very nature its right of way cannot receive any such benefit. We have heretofore mentioned the cases cited by appellant in support of this contention. There are, however, numerous authorities announcing the contrary doctrine which we now approve, holding that the right of way of a railroad is liable to special assessments for local improvements. This rule should certainly be adopted in this case, as our statutes and the charter of the city of Seattle confer such broad legislative authority upon the city council to determine what lands shall be included in the district as benefited by the improvement. 2 Cooley, Taxation (3d ed.), p. 1234; *Louisville etc. R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097; *Ludlow v. Trustees*, 78 Ky. 357; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, 36 Am. Dec. 82; *Louisville etc. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. 466; *Chicago etc. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Chicago etc. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *Illinois Cent. R. Co. v. People ex rel. Ashwill*, *supra*; *Pittsburg etc. R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Peru etc. R. Co. v. Hanna*, 68 Ind. 562; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Indianapolis etc. R. Co. v. Capital Paving etc. Co.*, 24 Ind. App. 414, 54 N. E. 1076; *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945; *State v. Lewis Co.*, 82 Minn. 390, 85 N. W. 207, 86 N. W. 611, 53 L. R. A. 421 (on rehearing).

In *New Whatcom v. Bellingham Bay etc. R. Co.*, 16 Wash. 137, 47 Pac. 237, we held that it was not within our province to say that a railroad right of way could, under no circumstances, be benefited by a street improvement, and sustained a special assessment on such right of way. We cannot express our views more clearly on this question than by quoting at

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length from the language of Mr. Justice Peck, in *Northern Indiana R. Co. v. Connelly*, *supra*:

"If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use, ground within the corporate limits of the city of Toledo, and over which that city had the power of making assessments to defray the expense of local improvements, and why should not the company be held to have taken it *cum onere*? A citizen would scarcely claim exemption, because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. The company have the exclusive right to the possession, so long as it is used for the road, and if the road-bed was exempt from taxation for general purposes, it would by no means follow that it was not liable for such special assessments. See 11 Johns. Rep. 77, where church sites, which by the laws of New York, were exempt from taxation, were held to be liable for such assessments. But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of *equivalents*, a compensation proportioned to the special benefits derived from the improvement, and that in the case at bar, the railroad company is not, and in the nature of things cannot be, in any degree, benefited by the improvement. It is quite true that the right to impose such special taxes, is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be *uniform*, affecting all the owners and all the property abutting on the street alike."

In *Louisville etc. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 Sup. Ct. 466, the first syllabus reads as follows:

"In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, for grading, paving and curbing an adjoining street is not void under the Fourteenth Amendment because the lot is

not benefited by the improvement owing to its present particular use."

In *Ludlow v. Trustees, supra*, the court of appeals of Kentucky said:

"While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value, or other benefit to the owner, shall be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property (*Northern Indiana R. R. Co. v. Connelly*, 10 Ohio State, 164). Absolute equality in the distribution of such burdens cannot be attained. An approximation to equality is all that is possible, but in reaching this point the present or prospective use of the property cannot enter into the calculation."

It might possibly be suggested that, in many of the cases here cited, the attacks made on the validity of special assessments were collateral, while in this instance the attack is direct. It is true that this hearing is on written objections to the proposed assessment. The objections which may be presented and adjudicated in a proceeding of this character do not extend to or question the right of the city council, in the exercise of its legislative authority, to determine that appellant's land is benefited and shall be included in the assessment district, but the appellant has the right to question by such objections all matters of procedure and the equality of the assessments made.

In *People ex rel. Scott v. Pitt, supra*, the court of appeals of New York, in passing on a statute of that state quite similar to the statutory and charter provisions here involved, said:

"The provisions of the charter did not deny to the relator the right to a judicial hearing before the assessment became conclusive upon him, and so far as that right is secured to the citizen by the Constitution or any principle of law in proceedings for imposing a tax or assessment it was not disregarded or violated by the statute in question. The relator

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was, by the terms of the act, entitled to a hearing and had a hearing before the local authorities upon every question to which the right applied. He had the right to show that the proceedings for the construction of the sewer were not initiated or conducted as required by the statute. He had the right to show that his property was so situated that he could not use the sewer for drainage purposes. He had the right to show that he owned no property on the line of the street, or if he did that the width was erroneously estimated. He had the right to a hearing upon every question relating to the validity or amount of the assessment except the principle or rule of apportionment and that was prescribed by the legislature in the exercise of its discretion, and he had no more right to a hearing upon that question after the statute was enacted than he had to a hearing upon the question whether his property should be assessed at all."

The determination of the city council that the appellant's land is benefited and should be included in the local improvement district and assessed, is final under any showing made in this case.

The appellant further contends that, even if it should be held that its right of way will receive some special benefit from the improvement, the assessment should not be made, as no lien can be enforced therefor. It insists there is no law in this state, nor any provision in the statute, for special assessments, which permits the road and right of way of a public service corporation to be broken up or sold in fragments, and the exercise of its franchise to be destroyed by piecemeal foreclosure and sales. The right and power to levy a special assessment upon the appellant's right of way is not in any way dependent upon the question as to whether a valid and enforceable lien can be created against its property. *Troy etc. R. Co. v. Kane*, 9 Hun. 506.

We do not understand that either the collection of the assessment, or the enforcement of any lien, is now before us for consideration. In this proceeding we cannot be called upon to anticipate and determine the validity of any method the city of Seattle may adopt for the collection of the assessment. It

will be ample time for us to pass upon that question when it is directly presented.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, and ROOT, JJ., concur.

MOUNT and RUDKIN, JJ., took no part.

[No. 6659. Decided August 2, 1907.]

SHAMGAR MORRIS *et al.*, Appellants, v. HEALY LUMBER
COMPANY *et al.*, Respondents.¹

LANDLORD AND TENANT—LEASE—ABANDONMENT. A lease of a strip of land intended to be used for a logging road is not abandoned by failure to build the road, where the lease did not require the same, and the lessee performs all conditions of the lease.

SAME—TENANCY AT WILL—INDEFINITE TERM—TERMINATION. If there is, in this state, a tenancy at will, it can only be terminated by giving the notice required for the termination of a tenancy for an indefinite time, a tenancy at will not being otherwise recognized by the statutes.

SAME—LACK OF MUTUALITY. A lease for one year, and "so on from year to year" until terminated by a notice to be given by the lessee, is not a lease for an indefinite term as defined by the statutes, and is not void for lack of mutuality.

EVIDENCE—PAROL—TO VARY TERMS OF LEASE. In an action to cancel a lease, parol evidence is inadmissible to show a condition that would defeat its operative effect.

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 28, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to procure the cancellation of a lease and the recovery of real property held thereunder. Affirmed.

Walter S. Fulton, for appellants.

Brownell & Coleman, for respondents.

¹Reported in 91 Pac. 186.

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Opinion Per FULLERTON, J.

FULLERTON, J. — The appellants brought this action against the respondents to procure a cancellation of a written lease and to recover the possession of certain lands held by the respondents under and by virtue of the lease. The facts necessary to an understanding of the controversy are in substance these: The appellants own certain lands situated in King county, described according to the United States government surveys, as the northeast quarter of the northeast quarter of section 9, and the north half of the northwest quarter, and the northwest quarter of the northeast quarter of section 10, all in township 25, north, of range 7, east of the Willamette meridian. The respondent Healy Lumber Company owns land abutting upon the appellants' land on the north, east, and south. The land of the respondent is valuable chiefly for the timber standing upon it. Owing to the topography of the country in its vicinity, the lands of the respondent cannot be logged profitably without bringing the logs out through certain gulleys or ravines which extend diagonally across the appellants' land.

In the year 1889 the respondent was engaged in logging the land lying north of the land of the appellants, and was bringing the logs out over a road extending diagonally across the two western forty-acre tracts above described, having theretofore entered into a written agreement with the appellants which granted it that right. In the year named a dispute arose between the parties as to the extent of the rights conferred by the agreement, and an action was begun by the appellants against the respondent to have them judicially determined. This action was settled by the execution of the agreement out of which the action at bar arises. The latter agreement contained seven clauses, only two of which, however, are material to the present controversy. By the first clause the appellants leased to the respondent for three years, "and no longer," the right to construct and operate a logging road through the two western forty-acre tracts, together with the right to use a small lake near the southern boundary of the

land as a storage ground. By the third clause they leased to the respondent a strip of land one hundred feet wide, being fifty feet on each side of a line theretofore surveyed through the two eastern forty-acre tracts, for a logging road or railroad to be thereafter constructed, and a tract of land in the northwest corner of the northeast quarter of the northwest quarter of section 10, sufficient in size for a logging camp, with the privilege of erecting buildings and other improvements thereon necessary and convenient for the use of the respondent in conducting the logging business. The duration of the lease was prescribed in the following language:

"To have and to hold said strip for a period of one year from the 24th day of October, 1889, and so on from year to year until the lease mentioned in this clause shall be terminated at the end of the first year or any subsequent year by the party of the second part [respondent] giving to the parties of the first part [appellants] one calendar month notice in writing, the party of the second part yielding and paying the yearly rent of fifteen dollars (\$15.00) on the 24th day of October of each and every year of said tenancy for said strip and the camping place hereinafter mentioned. Failure to pay said rent when the same falls due may be treated as a forfeiture of this lease by the parties of the first part."

The roadway described in this clause of the lease was intended to connect with the roadway described in the first clause, at or near the place where the camp was located, and its situation is such that it cannot be used as an independent way, but must be used in connection with the road first described. The respondent, however, did not find it necessary to make use of the way during the life of the lease mentioned in the first clause, and no logging road or railroad was ever constructed over the way. It took possession of the camping place and erected a number of buildings thereon shortly after the lease was executed, using it in connection with its logging business conducted while the lease mentioned in the first clause of the agreement was in existence. After the lease expired, it attempted to get it renewed by agreement, and failing in

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that, it sought to procure a right of way under a statute attempting to confer on logging companies the right of eminent domain. The statute was held unconstitutional by the trial court and the right to condemn denied, its judgment being affirmed by this court on appeal. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 96. After this decision, the respondent was obliged to cease its operations, since it was unable to get its logs to market. It therefore sold all of its stock and equipment of a perishable nature, keeping only its permanent equipment, blacksmith tools and the like. These it has since kept in the building, on the camp site, where the other named respondents have since resided.

Prior to commencing this action, the appellants made an oral demand upon the respondent for possession of the premises described in the third clause of the lease, and on its failure to surrender possession, brought this action for the purposes first stated. The trial court held that the facts did not justify a recovery, and entered judgment accordingly. This appeal is from that judgment.

The appellants' first contention is that there was an abandonment of this lease. But that there was no abandonment in fact is at once apparent. The respondent is actually in possession, and has now all of the possession that was surrendered to it when the lease was executed. Did its failure to build either the logging road or railroad amount to an abandonment in law? It seems to us that it did not. There was no express agreement in the lease that it would build either of the roads. The lease merely lets the land to the respondent for that purpose but does not obligate it to build. Hence it would seem that the mere failure of the lessee to do something it did not obligate itself to do could not be such an abandonment of the lease as to permit the lessor to reenter before the expiration of the term. Doubtless a failure on the part of the lessee to perform express stipulations contained in the lease may work a forfeiture where these stipulations are for the benefit

of the estate or the profit of the lessor, but forfeitures are never favored, and will not be enforced, even in actions at law, unless the right is clear and the proofs evident. The lease in question here contains no express stipulations that have been violated by the lessee, and we must conclude that the lessor cannot declare the lease at an end on this ground.

The second contention is that the lease creates a tenancy at will which could be terminated at any time by the lessor, and was so terminated by the oral notice to quit and the subsequent commencement of this action. But we cannot agree that this is the effect of the lease. In the first place, we think it may be doubted whether there is, under the statutes of this state, any such tenancy as a tenancy at will, at least, any such tenancy as a tenancy at will as that term was understood at common law. The statute recognizes but four species of tenancies, namely: tenancies for a fixed time; tenancies from year to year; tenancies for an indefinite term; and tenancies by sufferance. Bal. Code, §§ 4568-4571 (P. C. §§ 5998-6001). The nearest approach to a tenancy at will in the tenancies here mentioned is the tenancy for an indefinite time, but if the lease in question creates a tenancy for an indefinite time it does not aid the appellants in this action. Such tenancy can only be terminated by a written notice given thirty days or more preceding the end of some rent paying period (Id. § 4569), and no such notice was given in this case. But we do not think the lease was a lease for an indefinite time in the sense used in the code. By its terms it was to expire, if not sooner forfeited for the nonpayment of rent, when the lessee gave one calendar month's notice in writing to that effect at the end of the first year of the lease or any subsequent year. In other words it bound the lessor as long as the lessee paid the rent, and bound the lessee until he gave the calendar month's notice in writing. It is argued that this construction of the lease avoids it because it then lacks mutuality. But mutuality in this sense is not essential to a valid lease. In this state there are no restrictions upon the right of aliena-

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tion. A person owning land in fee may convey a fee; and having power to convey a fee, may convey any interest in the land less than a fee. *Tischner v. Rutledge*, 35 Wash. 285, 77 Pac. 388. So in this case, the appellants having power to convey their whole estate by deed, had power to convey in the same manner any lesser estate therein.

Lastly it is contended that the court erred in excluding evidence as to the consideration that actuated the appellants in entering into the lease. But such evidence was immaterial to any issue made by the pleadings. While it is permissible for certain purposes to show by parol what the actual consideration was upon which a deed is founded, it is never permitted where the purpose of the evidence is to annex a condition to the instrument not expressed in it. Here the purpose of the oral evidence was to show that the grant was made upon a condition that would defeat its operative effect, and for this purpose parol evidence is inadmissible. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

The judgment appealed from is affirmed.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

[No. 6765. Decided August 2, 1907.]

MINNIE C. FORSTER *et al.*, *Appellants*, v. HANNAH RAZNIK
et al., *Respondents*, HOLLAND BANK, *Intervener*.¹

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTION—ADVERSE POSSESSION—ESTOPPEL. An abutting owner is estopped to claim that a strip of land fourteen and one-half feet wide, between two platted additions to a city, is a public alley, or to maintain an action to enjoin its obstruction, where he and his predecessors had stood by for over twenty years while another was in the adverse possession under color of title and claim of right, and while such other improved the property and erected a permanent building thereon, and the city had disclaimed any right to the strip as an alley and levied taxes and assessments against the same.

INJUNCTIONS—PARTIES—HIGHWAYS—OBSTRUCTION. A mortgagee of a strip of land is a proper but not a necessary party to an action to declare the same a public alley, and is properly allowed to intervene therein.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 14, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the obstruction of an alley. Affirmed.

Merritt, Oswald & Merritt, and *A. W. Witherspoon*, for appellants.

Robertson & Rosenhaupt, for respondents.

Post, Avery & Higgins, for intervener.

ROOT, J.—This is an action to enjoin respondents, except the Holland Bank, intervener, from obstructing a strip of land claimed by appellants to be an alley, in the city of Spokane. The Holland Bank, claiming to have a mortgage covering said parcel of land, was permitted to intervene. The trial court found that this portion of land had been, in effect, originally dedicated as an alley, but that the appellants were estopped from maintaining this action. Whereupon a

¹Reported in 91 Pac. 252.

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judgment of dismissal was entered, from which this appeal is prosecuted.

The parcel of land involved is fourteen and one-half feet wide and lies between, or marks the boundary of, two additions to said city, and if treated as an alley it would connect Riverside and Sprague avenues. It was the contention of respondents that this parcel of land was never intended as an alley or public way by those who platted the additions mentioned. They further contend that, even if it be held to have been dedicated as an alley when the plats were filed, nevertheless these appellants and their predecessors in interest have been guilty of such laches as to estop them from maintaining this action. The appellants, as owners of a lot abutting upon said parcel of ground, claim an easement therein and thereover as a public alley, and urge that the defense of respondents is in effect a claim of title by adverse possession, which cannot be asserted in and to a public street or alley, and rely especially in support of their contention upon *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549, and *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182.

It appears that this strip of land was, by the makers of the plat of one of these additions, some years after the filing of said plat, conveyed, or attempted to be conveyed, to Frank H. Graves, by warranty deed, in October, 1885, and after various mesne conveyances, a deed thereof was made by one of his successors in interest, to the respondents Raznik. The ground appears never to have been used at any time as an alley. In 1887 the city council of Spokane adopted a resolution reciting that, whereas there was some controversy concerning the matter, they were of the opinion that the city had no vested right in said ground, and thereby disclaimed all rights to the same as a public alley or highway. Subsequently the city appears to have assumed a different attitude, although it did not open or use the strip as an alley. It has been assessed annually, with possibly one or two exceptions, since 1885, by or for the city, and the taxes were always paid. Special assessments were also levied against it by the city for

the improvement of Riverside avenue, Bernard street, and Sprague avenue, some of these having the effect of lessening the amount assessed upon appellants' property abutting thereupon. A building was erected thereon in 1887, and a permanent building in 1897. The defendants Raznik and their predecessors appear to have been, for more than twenty years last past, in the actual, open, and notorious possession, under color of title and claim of ownership. Neither appellants nor their ancestors are shown to have objected to this possession, or to have made any protest against the improvement or occupation of said strip of land by said defendants and their grantors. There was evidence that, when these defendants constructed the permanent building referred to, the west wall thereof was connected with the east wall of a building owned by these appellants or their predecessor in interest, by consent.

We think the judgment of the trial court was correct. As said by appellants, this court has decided that mere adverse possession is not sufficient to acquire title to an alley or public street. But in one of the cases referred to, that of *West Seattle v. West Land & Imp. Co.*, the court said:

"We hold, on both principle and authority, that a municipality is not barred of its right to remove an obstruction from a public street by mere lapse of time. Some other element of estoppel must enter into the case. Mere lapse of time and the payment of personal taxes on the improvements are here relied on. These are insufficient."

It would seem that this language clearly implies that a case might arise where an element of estoppel would prevent the occupant of an alley or street from being disturbed, and such is undoubtedly the law. In *Northern Pacific R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 Am. St. 766, 54 L. R. A. 526, it was said:

"If the doctrine of estoppel can ever be invoked, it seems to us that it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. . . . The appellant should not be allowed to escape the

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consequences of its own wrongful acts, and reap a fraudulent benefit, by pleading the rights of the government. Indeed, our government is presumably founded upon equitable principles, not in theory alone, but in practice, and the citizen has a right to expect equitable treatment, even at the hands of the government; and it has been held that in good conscience the government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen."

The court cited *State ex rel. Attorney General v. Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391, and *Commonwealth v. Bala etc. Turnpike Co.*, 153 Pa. St. 47, 25 Atl. 1105, in the matter of which cases it was said, in substance, that the question involved was not one under the statute of limitations but of laches, which might be imputed to the state as well as to an individual—that while time did not run as against the state, yet the lapse of time, together with other elements, might work an estoppel, even as against the sovereign. In the case of *Spokane Street R. Co v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072, a case where a street railway, not having authority under its franchise so to do, had taken possession of, used, and made valuable improvements in, certain streets, and occupied the same in the operation of its road for over two years, this court said:

"A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority. In this case the appellant had authority by ordinance to lay down a street railroad upon a number of streets; it mistook its rights and placed a part of its track in a place not designated in its ordinance. Technically, it had no right to put its track where it did, but . . . the municipal officers . . . knew that the track was being laid on Division street, and no objection was made, . . . The general rule would, of course, be that franchises of this kind could not be acquired except by the action of the corporation, which must be taken by ordinance, but the statute in question does not prohibit the courts from declaring an estoppel against the city in other matters in the same manner that they would as against private persons."

In the case of *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515, where a street railroad company had occupied certain streets in which it had operated its railway line for several years without a grant, privilege, or franchise from the city or county, it was stated that the city could not object to the further occupation of said streets by said company.

It is urged by the appellants that the occupation of this strip of land was an obstruction in a public alley, and consequently a nuisance and a constantly recurring nuisance, by reason of which respondents could gain no property rights whatever. If there had been no question as to the dedication of the strip of land and it had been conceded at all times that the place was a public alley, there would be more force in this argument; but it appears that these defendants and their grantors had for many years regarded and treated it as if it were not an alley and as if it had never been dedicated; and the action of the city council, whether valid or otherwise, in disclaiming any rights to the land as an alley, would tend to confirm them in the belief that it was their property and not that of the public; and the silence of appellants and their predecessors in interest, while this parcel of land was being built upon, occupied, and used for so many years, would seem to be a strong indication that they had acquiesced in the belief that the strip was not a public alley. It would probably serve no good purpose to analyze the evidence in detail. We think, from a consideration of all of the evidence and admitted facts in the case, that the appellants ought not to be heard to question the right of defendants to occupy the strip of land involved herein.

As to the right of the Holland Bank to intervene, we think it was a proper, although possibly not a necessary, party. We see no error in the action of the trial court in permitting the bank to intervene.

The judgment of the superior court is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

Mar. 1907]

Opinion Per Curiam.

[No. 6312. Decided March 23, 1907.]

ANNA W. BENEKE *et al.*, Appellants, v. HENRY J. BENEKE, EXECUTOR,
et al., Respondents.¹

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 19, 1905, dismissing an action to set aside a will. Affirmed.

W. D. Scott and *H. M. Stephens*, for appellants.

Danson & Williams, for respondents.

PER CURIAM.—This action was brought to set aside the last will of Henry Beneke, deceased, for the alleged reason that the testator was not of sound and disposing mind, and the further reason that one of his sons exercised undue influence over the testator at the time the will was made. The trial court, after hearing the evidence in the case, found that the testator was of sound and disposing mind at the time the will was made, and that he made his will of his own volition, without interference from any person, and adjudged the will valid, and dismissed the contest. Contestants appeal from these findings of fact.

The only questions presented are questions of fact. We have carefully examined the evidence and are convinced that the findings of the trial court are in accord with the weight of the evidence. We deem it unnecessary to enter into a discussion of the evidence or to set any of it out in this opinion.

The judgment appealed from is affirmed.

[No. 5866. Decided March 25, 1907.]

MARION B. BAXTER *et al.*, Appellants, v. CLAY ALLEN, as Receiver of
the De Soto Placer Mining Company, Respondent.²

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 22, 1905. Affirmed.

I. D. McOutcheon, for appellants.

Byers & Byers and *Clay Allen*, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—Upon petition on the part of the appellants, a rehearing was granted in this case. But upon such resubmission and reconsideration, we are not convinced that the former opinion of the court (*Allen v. Baxter*, 42 Wash. 434, 85 Pac. 26), was not correct; and being satisfied with the decision there made and announced, the judgment is affirmed.

¹Reported in 89 Pac. 150.

²Reported in 89 Pac. 151.

[No. 6652. Decided June 4, 1907.]

H. C. LITTOOY, *Appellant*, v. THE STATE OF WASHINGTON AND THE STATE BOARD OF DENTAL EXAMINERS *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Thurston county, Linn., J., entered July 25, 1906. Affirmed.

Parker & Brown, for appellant.

The Attorney General, *E. C. Macdonald* and *A. J. Falknor*, Assistants, *Walter M. Harvey*, *Samuel R. Stern*, and *W. F. Meier*, for respondents.

PER CURIAM.—This case presents the same question as *Brown v. State*, *ante* p. 399, 90 Pac. 266. For the reasons there stated the judgment is affirmed.

[No. 6546. Decided June 22, 1907.]

LUCILE DREYFUS MINING COMPANY, *Respondent*, v. H. S. WILLARD *et al.*, *Appellants*.²

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 13, 1906. Affirmed.

H. S. Stoolfre and *Voorhees & Voorhees*, for appellants.

Will H. Thompson and *Charles A. Murray*, for respondent.

PER CURIAM.—In this case it appears that several of the defendants (of whom there were many) gave notice of appeal. By the decision heretofore handed down (*ante* p. 345, 89 Pac. 935), we disposed of the appeals of the only defendants who had filed briefs in the case, and they were the only appellants who had perfected their appeals. Since that time appellant John H. Peet has filed his appearance fee herein and has called the court's attention to stipulations with the respondent, wherein it was agreed that he should not be under the necessity of filing a brief in this court, but that his appeal should be determined by the decision of the court of the appeal of any other appellant herein the facts of whose case were the same as those of his own. He now claims that his case comes within the rule announced by this court as to the original certificates purchased by appellant Willard and sent by him to Kressly as secretary of the company, to be transferred on the books. Respondent, however, maintains that the facts of appellant Peet's case bring it within that part of the decision bearing upon the appeals of Finley and Jamieson. We think respondent's contention must be upheld.

The judgment of the superior court, in so far as it affects the rights of appellant Peet, is affirmed.

¹Reported in 90 Pac. 267.

²Reported in 90 Pac. 1135.

Oct. 1907]

Opinion Per Curiam.

[No. 6646. Decided July 26, 1907.]

G. E. COLBY, Respondent, v. MONTANA STABLES, Appellant.¹

Appeal from a judgment of the superior court for King county, Morris, J., entered October 10, 1906. Affirmed.

Brown, Leehey & Kane, for appellant.

McBurney & Cummings, for respondent.

PER CURIAM.—The facts and issues in this case are the same as in the case of *Weaver v. Montana Stables*, ante p. 65, 89 Pac. 154. No new questions are presented. For the reasons there stated, the judgment in this case must be affirmed. It is so ordered.

[No. 6482. Decided October 19, 1907.]

JOHN R. WITHERILL et al., Respondents, v. JAMES FRAUNFELTER et al., Appellants.²

Appeal from a judgment of the superior court for King county, Griffin, J., entered August 9, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

Harold Preston and Charles E. Patterson, for appellants..

E. P. Whiting, for respondents.

Per Curiam.—This is an action brought to quiet the title to certain real property situated in King county. The property in question was purchased as an investment by one L. B. Lockard, then a married man, domiciled in the state of Pennsylvania, with money accumulated from the profits of a business conducted by himself in that state, while residing therein with his wife. After the purchase, the wife died, and Lockard sold the land to the predecessors in interest of the appellants. The respondents claim title as the successors in interest of the heirs of the wife. The laws of Pennsylvania governing the ownership of money acquired as the money invested in this property was acquired is substantially the common law; the money being under the absolute control and dominion of the husband. The single question presented by the record is, was the real property in question the separate property of Lockard or

¹Reported in 91 Pac. 1135.

²Reported in 91 Pac. 1086.

the community property of Lockard and wife. If it was the former, the appellants have title, if the latter, title is in the respondents.

This precise question was presented to this court in the case of *Brookman v. Durkee*, ante p. 578, 90 Pac. 914, and the property then in question decided to be the separate property of the husband. That case is controlling here, and requires a reversal of the judgment entered by the court below. The order will be, therefore, that the judgment appealed from be reversed, and the cause remanded with instructions to enter a judgment in favor of the appellants for the interest in dispute.

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1. ACTIONS—FORM—ABOLISHMENT OF DISTINCTIONS—QUIETING TITLE—CREDITOR'S SUIT—RELIEF. An action by a judgment creditor to quiet title, in which the complaint alleges a conveyance in fraud of creditors and the purchase of the property by plaintiff on execution sale, should not be dismissed for error in the form of action, in that the complaint failed to allege that the plaintiff was in possession or that the land was vacant and unoccupied, but alleged the defendants to be in possession by the receipt of rents; since the code abolishes all distinctions in the forms of action, and the court may give the relief sought where the facts stated show the party entitled thereto. *Brown v. Baldwin*..... 106

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See PRINCIPAL AND AGENT.

AGREEMENT:

See CONTRACTS.

AGRICULTURE:

Irrigation, see WATERS AND WATER COURSES.

ALIENATION:

Of lands by Indians, see INDIANS.

ALIENS:

1. ALIENS—RIGHT TO ACQUIRE REAL ESTATE—MINERAL LANDS—CONSTITUTIONAL LAW—CONSTRUCTION. An alien can acquire lands in this state containing deposits of limestone, silica, silicated rock and clay, to be used in good faith in the manufacture of cement, such deposits being "minerals" within the meaning of Const., art. 2, § 33, and not to be restricted by the words "metals, iron, coal or fire clay," following; since a construction must be adopted to give effect to every part of the clause and to give words their natural and ordinary meaning. *State ex rel. Atkinson v. Evans*..... 219
2. ALIENS—RIGHT TO HOLD LAND—ESCHEAT—CONVEYANCE. The state cannot maintain an action to escheat lands, conveyed to and held by an alien in violation of the constitution, after the same have been conveyed by the alien to a citizen. *State ex rel. Atkinson v. World Real Estate Commercial Co.*..... 104

ALLOTMENT:

Of exempt property, see HOMESTEAD, 2.
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ALTERATION OF INSTRUMENTS:

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ANIMALS:

Larceny of, see LARCENY.

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Of marriage, see MARRIAGE.

APPEAL AND ERROR:

- Harmless error as to pleadings, see CANCELLATION OF INSTRUMENTS, 3.
- Existence of remedy by appeal as bar to certiorari, see CERTIORARI.
- Costs on appeal, see COSTS.
- Criminal prosecution, see CRIMINAL LAW, 4, 7.
- Condemnation proceedings, see EMINENT DOMAIN, 22, 25-29.
- Harmless error in entry of judgment, see JUDGMENT, 4.
- Remedy by appeal or writ of error as barring mandamus, see MANDAMUS, 1.
- Mandamus to compel allowance of supersedeas, see MANDAMUS, 1.
- Review of proceedings on assessment for public improvements, see MUNICIPAL CORPORATIONS, 4, 8.
- Harmless error in admission of expert evidence, see NEGLIGENCE, 3.
- Restraining proceedings in trial court after appeal taken, see PROHIBITION.
- Remedy by appeal or writ of error as barring prohibition, see PROHIBITION.

I. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS REVIEWABLE—ORDERS ON PLEADINGS.** No appeal lies from an order permitting the filing of an amended complaint. *Albin v. Seattle Electric Co.*..... 420
2. **SAME—DECISIONS REVIEWABLE—GRANT OF NEW TRIAL.** An order granting a new trial is not appealable when it is made pursuant to directions of the supreme court in reversing the case on a former appeal. *Albin v. Seattle Electric Co.*..... 420
3. **APPEAL—DECISIONS REVIEWABLE—AFFECTING SUBSTANTIAL RIGHTS.** Orders sustaining a demurrer to a complaint in intervention and denying leave to amend the complaint are not appealable as orders affecting a substantial right which in effect determine the proceeding or discontinue the action. *Seattle & Northern R. Co. v. Bowman* 90

II. RIGHT TO APPEAL.

4. **APPEAL—RIGHT TO APPEAL—INTEREST OF PARTY.** A sheriff who has been enjoined from proceeding to sell property under execution has such an interest in the controversy as to entitle him to appeal from the judgment. *Heintz v. Brown*..... 387
5. **APPEAL—RIGHT TO APPEAL—CROSS-APPEALS.** A cross-appeal may be taken from any part of a final judgment which is adverse to the claims of the respondent in whose favor the judgment was entered. *McDonald v. White*..... 334

III. PRESERVATION OF GROUNDS.

6. **APPEAL—RESERVATION OF GROUNDS—DISMISSAL.** A cross-appeal based upon a contention not raised in the court below will be dismissed. *Schmidt v. Olympia Light and Power Co.*..... 360

APPEAL AND ERROR—CONTINUED.

7. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** In the absence of exceptions to the findings, they cannot be reviewed on appeal. *Pierce v. Pettit*..... 668

IV. REQUISITES FOR TRANSFER.

8. **APPEAL—NOTICE—TIME FOR TAKING.** Where notice of appeal is not served within ninety days after the date of entry of judgment, the appeal will be dismissed. *Shipley v. McPherson*..... 172

V. SUPERSEDEAS.

9. **APPEAL—BONDS—SUPERSEDEAS—SUFFICIENCY.** Where the bond on appeal conditioned also as a supersedeas bond, is in less than double the amount of a money judgment and two hundred dollars additional, the same is ineffectual for any purpose and the appeal will be dismissed. *Tibbitts v. Henry*..... 306
10. **SAME—FIXING AMOUNT OF BOND.** An appeal from a judgment quieting title, and for costs, will be dismissed where the bond on appeal is conditioned also as a supersedeas bond, without the amount thereof having been fixed by order of the trial court. *Tibbitts v. Henry* 306

VI. RECORD.

11. **APPEAL—RECORD—TRANSCRIPT.** The order calling for the issuance of a special jury venire, and records showing the issuance of a venire and selection of a jury from the jurors summoned, are properly part of the record to be certified by the clerk as part of the transcript on appeal without any bill of exceptions or statement of facts. *Oregon R. & Nav. Co. v. McCormick*..... 45

VII. REVIEW.

12. **APPEAL—REVIEW—THEORY OF CASE.** An action to quiet title tried in the court below as if upon sufficient pleadings, must be tried upon the same theory on appeal. *Sylvester v. State*..... 585
13. **APPEAL—REVIEW—SCOPE.** Questions going to the merits of the case cannot be considered on appeal from an order granting a new trial. *Cook v. Skinner*..... 246
14. **SAME—REVIEW—QUESTIONS PRESENTED.** An appeal from an order refusing to strike an amended complaint and dismiss the action, does not bring up the question whether the action is barred by the statute of limitations, or the sufficiency of the pleading. *Albin v. Seattle Electric Co.*..... 420
15. **APPEAL—REVIEW—ERROR FAVORABLE TO APPEAL.** Appellant cannot complain of error in refusing to allow the respondent a counterclaim, upon dismissing appellant's action on the merits. *Graham v. Bell-Irving* 607

APPEAL AND ERROR—CONTINUED.

16. APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR—RAILROADS—FIRES—INSTRUCTIONS. In an action for damages from a fire alleged to have been set out through negligence in allowing combustible material on the right of way and the use of a defective locomotive, the defendant cannot claim reversible error in instructing the jury on the subject of defective appliances within the issues, although the same had been eliminated by concession at the trial, where the appellant, over respondent's objection, had introduced much testimony on the subject. *Fireman's Fund Insurance Co. v. Northern Pac. R. Co.* 635
17. APPEAL—REVIEW—AMENDMENT OF PLEADINGS. In a trial before the court without a jury, defects in the pleadings capable of amendment will be disregarded and the cause tried *de novo* on the evidence as though the pleadings had been amended. *Vogler v. Anderson* 202
18. APPEAL—REVIEW—PRESUMPTIONS—NEW TRIAL. Where a new trial may have been granted on one of several grounds, the order will not be reversed if within the discretion of the court upon any grounds. *Prosch v. Seattle*..... 553
19. APPEAL—REVIEW—DISCRETION—NEW TRIAL. An order granting a new trial, which does not show upon which one of several grounds it was based, will not be reversed on appeal in the absence of a showing of abuse of discretion. *Hartley v. Ferguson*..... 33
20. SAME—DISCRETION—NEW TRIAL. An order granting a new trial on the ground of newly discovered evidence will not be disturbed on appeal except for abuse of discretion. *Cook v. Skinner*..... 246
21. APPEAL—REVIEW—VERDICTS. A verdict of a jury will not be set aside where the weight of the evidence and the credibility of the witnesses was for the jury, and the trial court denied a new trial. *Brennan v. Seattle*..... 427
22. APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal. *Waldron v. Lynn*..... 69
23. APPEAL—REVIEW—VERDICTS—CONFLICTING EVIDENCE. Where a contract was executed in duplicate and both copies left with the attorney who drew the papers, the verdict of the jury upon an issue as to whether the contract was completed, or was to be delivered in a certain event, is conclusive where the evidence was conflicting. *Belch v. Big Store Co.*..... 1
24. APPEAL—REVIEW—VERDICT. The weight and preponderance of the evidence is for the jury where the evidence is conflicting. *Richardson v. Agnew*..... 117

APPEAL AND ERROR—CONTINUED.

25. APPEAL—REVIEW—VERDICTS. The verdict of a jury upon evidence sufficient if true to support the findings, cannot be disturbed by the supreme court. *Pachko v. Wilkeson Coal and Coke Co.*..... 422
26. APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence will not be disturbed on appeal where there is sufficient evidence to sustain it. *Schultz v. Simmons Fur Co.*..... 555
27. APPEAL—REVIEW—VERDICTS. The verdict of a jury upon conflicting evidence is conclusive on appeal, even if against the weight of the evidence. *Norman v. Bellingham.*..... 205
28. APPEAL—REVIEW—FINDINGS—DIVORCE. Upon appeal from a judgment denying a divorce, in which the findings bring the plaintiff completely within the provisions of the statute respecting nonsupport, justifying a decree, and there are no findings justifying or excusing the defendant's neglect, or any statement of facts brought up on appeal, the case must be reversed with directions to grant a divorce. *Seigmund v. Seigmund.*..... 572
29. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence in an action at law tried before the court without a jury will not be disturbed on appeal. *Graham v. Bell-Irving.*..... 607
30. APPEAL—REVIEW—FINDINGS. Findings will not be disturbed on appeal where they are amply sustained by the evidence. *Kane v. Jones* 631
31. SAME—AMENDMENT OF COMPLAINT—CREDITOR'S SUIT—RETURN OF NULLA BONA. In an action by a judgment creditor to quiet title to property conveyed by the debtor in fraud of creditors, findings for plaintiff will not be reversed on appeal for failure to show an execution returned *nulla bona*, where the court found upon sufficient evidence that the debtor had no other property; and the pleadings will be considered amended in that respect. *Brown v. Baldwin.*..... 106
32. APPEAL—REVIEW—HARMLESS ERROR—AMENDMENTS TO CONFORM TO PROOF. If a complaint in replevin is faulty in not deraigning the plaintiff's title, and the court refuses a request for an amendment to cure the defect on the ground that the amendment is essential, the defendant cannot be misled, and the supreme court will on appeal consider the amendment made to conform to the proof. *Hester v. Stine* 469
33. SAME—HARMLESS ERROR. Error in admitting evidence of changes made after an accident to an employee is not prejudicial where it was not capable of injuring the party complaining thereof. *Pachko v. Wilkeson Coal and Coke Co.*..... 422
34. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in an equity case triable *de novo* on appeal is harmless. *Brown v. Baldwin.*..... 106

APPEAL AND ERROR—CONTINUED.

VIII. DETERMINATION AND DISPOSITION OF CAUSE.

35. APPEAL—DECISION—LAW OF CASE—JUDGMENT—RES JUDICATA—ISSUES CONCLUDED. Where, upon an appeal, it is held that the vested rights of a littoral owner on a navigable lake were not affected by the adoption of the constitution and can be acquired only by the right of eminent domain, and an injunction was granted unless such proceedings be commenced, the decision is the law of the case, and on appeal from the subsequent condemnation proceeding between the same parties, it cannot be claimed that the owner of the property had no littoral rights by reason of the act of Congress of March 3, 1877, providing that surplus waters should remain free for the use of public irrigation; since such contention might have been raised in the prior suit. *Spokane Valley Land and Water Co. v. Madison* 640
36. APPEAL—DECISION—NEW TRIAL. Upon reversing a judgment for plaintiff, entered on a challenge to the sufficiency of the defendants' evidence to sustain their affirmative defense, a new trial should be awarded. *Frye & Bruhn v. Phillips*..... 190

APPEARANCE:

As waiver of process, see JUDGMENT, 2.

APPOINTMENT:

Of county officers, see COUNTIES, 2.
Of receiver, see RECEIVERS.

APPORTIONMENT:

Of expenses or benefits of public improvements, see MUNICIPAL CORPORATIONS, 12.

APPROPRIATION:

Of water rights in public lands, see WATERS AND WATER COURSES, 2.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 3.

ARSON:

1. ARSON—CORPUS DELICTI—EVIDENCE. In a prosecution for arson the *corpus delicti* is not established by the fact of the burning of a building, as the presumption is that it was by accident or natural causes. *State v. Pienick*..... 522
2. SAME—SUFFICIENCY OF EVIDENCE. A conviction for arson is not sustained by purely circumstantial evidence creating a suspicion against the accused, unless he is connected with the crime beyond a reasonable doubt, or the circumstances are irreconcilable with his innocence; and where such evidence is consistent with the hypothe-

ARSON—CONTINUED.

sis of his innocence, and absolutely no motive was shown, the *corpus delicti* was not established beyond a reasonable doubt and the supreme court will reverse the judgment; although the trial court refused to set aside a verdict of guilty. *State v. Pienick*..... 522

ASSAULT AND BATTERY:

1. **ASSAULT—CIVIL LIABILITY—ACTIONS—DAMAGES.** A judgment for \$250, for damages received in a fight which either of the parties could have avoided, is proper, where the plaintiff's biting of the defendant was unjustifiable, and entailed a loss of \$50 for medical attendance and three months loss of time, worth \$50 per month. *Milam v. Milam*..... 468

ASSESSMENT:

Of damages in condemnation proceedings, see **EMINENT DOMAIN**, 22, 24.

Forfeiture of payments under insurance certificate, see **INSURANCE**.

For public improvements, see **MUNICIPAL CORPORATIONS**, 2-12.

Of tax, see **TAXATION**, 4.

ASSIGNMENTS:

Of preference rights to purchase tide lands, see **JUDGMENT**, 5, 6.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 3, 4, 11.

ATTORNEY AND CLIENT:

Argument or conduct of counsel at trial in civil actions, see **TRIAL**, 3.

Attorney's fees in action for damages, see **VENDOR AND PURCHASER**, 12.

1. **ATTORNEY AND CLIENT—AUTHORITY—NOTICE—ESTOPPEL—EQUITY.** Where an attorney foreclosed a mortgage upon a tract of land subject to a water right, the extent of which was in dispute, and in litigating the question, suppressed knowledge of a lost unrecorded deed which granted to the defendants the greater water right contended for by them, whereby a decree was entered in favor of the plaintiffs adjudging the premises subject to the lesser water right only, the knowledge of the attorney becomes the knowledge of another of his clients who purchased the lesser right shortly after the foreclosure; who accordingly would not be entitled to equitable relief to obtain the greater water right as against the purchaser at the foreclosure sale. *Schmidt v. Olympia Light and Power Co.*..... 360
2. **ATTORNEY AND CLIENT—AUTHORITY—SATISFACTION OF ASSIGNED JUDGMENT.** Where, after a judgment for plaintiff has been assigned, an appeal is taken and plaintiff's attorney of record appeared for the respondent on the appeal, he was the attorney for the assignee of the judgment, although paid by the plaintiff, and had authority to receive payment and satisfy the judgment under Bal. Code, § 4766. *Hayes v. Koepfli*..... 43

ATTORNEY AND CLIENT—CONTINUED.

3. **ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—PLEADING AND PROOF.** In an action to recover attorney's fees by an attorney who had been discharged, evidence on the part of the defendant that plaintiff did not attend to the taking of certain depositions is inadmissible under an answer alleging a discharge on account of plaintiff's improper conduct in having instigated the case, and where it did not appear that the depositions were necessary. *Sessions v. Warwick* 165
4. **SAME—DISCHARGE—TRIAL—DIRECTION OF VERDICT.** In an action by an attorney to recover on an entire contract for the payment of \$1,000 for services to be rendered in another suit, the jury is properly discharged and judgment rendered for the plaintiff, where the defendant's evidence admits the contract and the balance due, and there was no evidence of any defense to go to the jury; it appearing that the only ground alleged in the answer for discharging the plaintiff was known to the defendant before employing the plaintiff. *Sessions v. Warwick*..... 165

AUTHORITY:

- Of attorney, see ATTORNEY AND CLIENT, 1, 2.
- Of broker, see BROKERS, 1.
- Of corporate officers or agents, see CORPORATIONS, 3-6.
- Of agent, see INSURANCE, 6; PRINCIPAL AND AGENT, 2.

BANKS AND BANKING:

Liability to garnishment, see GARNISHMENT.

1. **BANKS AND BANKING—CHECKS—PAYMENT—FORGERY—RECOVERY OF MONEY PAID.** Where forged checks were cashed by another bank, the bank on which the checks were drawn may, after negligently paying the checks before discovery of the forgery, recover from such other bank the amount so paid to it, if such bank has not been placed in a worse position than it would have been in had payment of the checks been refused and prompt notice of the forgery given. *Canadian Bank of Commerce v. Bingham*..... 657

BAR:

- Of action by former adjudication, see JUDGMENT, 10-17.
- Of action by limitation, see LIMITATION OF ACTIONS, 1.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance association, see INSURANCE.

BENEFITS:

Mutual benefit insurance, see INSURANCE.

BIAS:

Of juror, see **JURY**, 2.

BILLS AND NOTES:

Authority of officers to execute notes on behalf of corporation, see **CORPORATIONS**, 3-5.

As property subject to garnishment, see **GARNISHMENT**.

BONA FIDE PURCHASER:

Of community property, see **HUSBAND AND WIFE**, 5.

Of lands, see **VENDOR AND PURCHASER**, 4-7.

BONDS:

Limitation of action on statutory bond, see **LIMITATION OF ACTIONS**, 2.

On appeal, see **APPEAL AND ERROR**, 9, 10.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 21.

BOUNDARIES:

Mistake in laying fence, see **ADVERSE POSSESSION**, 1.

Description of land in deeds, see **DEEDS**, 1.

1. **BOUNDARIES—NAVIGABLE WATERS—SHORE LANDS—TITLE.** The government meander line of a navigable lake marks the boundary of a grant made prior to the adoption of the constitution only where the same is below high-water mark, and if the meander is above high-water mark, the owner took title to the land to high-water mark. *Van Siclen v. Muir*..... 38
2. **BOUNDARIES—EVIDENCE—SUFFICIENCY.** Evidence of one purchasing a lot according to the recorded plat, that she saw a stake at one corner of the block, is not sufficient to show a corner at variance with the plat where the stake was not identified in any way. *La Bounty v. Seattle*..... 141

BROKERS:

Sufficiency of contract of employment, see **FRAUDS, STATUTE OF**, 1.

Agreement conveying interest in property as distinguished from brokerage contract, see **VENDOR AND PURCHASER**, 1.

1. **BROKERS—AUTHORITY—BREACH OF DUTY—SPECIFIC PERFORMANCE.** Where a real estate broker was employed by the owner of land to effect a sale, a contract in the form of a receipt to the agent for earnest money, intending a sale to a third party, gives the agent no personal interest which he could enforce in his own favor. *Anderson v. Lawler*..... 543
2. **BROKERS—CONTRACT—PERFORMANCE WITHIN AGREED TIME—EVIDENCE—SUFFICIENCY.** In an action to recover a broker's commission for procuring a purchaser prior to 3:30 p. m. of the same day the contract was made, the evidence is sufficient to sustain findings for the plaintiff, where it appears that he procured a purchaser ready

BROKERS—CONTINUED.

and able to buy on the terms stated within the required time, but a change in the terms of the contract being suggested, the owner referred the same to his attorney, and finally consented thereto late the same afternoon, but demanded the purchaser's signature to the modified contract before 9:30 o'clock the next morning; that, upon its being explained that it would be difficult to find the purchaser by that time, the owner remained silent, thereby acquiescing in delay for a reasonable time; and that the purchaser signed the modified contract the next morning as soon as he could be found, and is still ready and willing to buy the property. *Muir v. Moeller*..... 601

3. **BROKERS—CONTRACT FOR PROFITS—TIME FOR PERFORMANCE.** Where lots are purchased for speculation, the vendee agreeing to pay a broker one-third of the net profits when the lots are sold, a reasonable time for sale is intended, and upon death of the vendee and repudiation of the contract by his executor, the broker may recover of the estate one-third of the net value of the land after deducting all expenses. *Kauffman v. Baillie*..... 248

4. **BROKERS—REFUND—PRINCIPAL AND AGENT—PERSONAL LIABILITY OF AGENT.** Real estate brokers, acting as agents of a disclosed principal, the owner of land, are not personally liable to a purchaser of the land, upon breach of the owner's contract to convey, for a refund of earnest money paid to the agents, under the agents' agreement to refund the same if the sale was not approved by the owner, where the sale was approved by the owner and the money paid over to him by the agents, and the purchaser knew, as shown by his original complaint, that the brokers were acting as agents of the owner. *Tripple v. Littlefield*..... 156

BUILDINGS:

Burning of, see **ARSON**.

Delivery or use of materials, see **MECHANICS' LIENS**.

BURDEN OF PROOF:

See **MALICIOUS PROSECUTION**.

In action for libel, see **LIBEL AND SLANDER**, 1.

To show contributory negligence, see **NEGLIGENCE**, 4.

BY-LAWS:

Right of officers to waive, see **INSURANCE**, 6.

CANCELLATION OF INSTRUMENTS:

Right to cancellation of spurious stock, see **CORPORATIONS**, 1, 2.

1. **CANCELLATION OF INSTRUMENTS—FRAUD—COMPLAINT—SUFFICIENCY.** A complaint in an action to cancel an assignment of a school land contract and to quiet title, alleging the assignment by plaintiffs to

CANCELLATION OF INSTRUMENTS—CONTINUED.

- one of the defendants of the contract for the land, which was agreed to be held in trust to secure advances to be made by such defendant, the breach of the contract by him, and that he was about to fraudulently convey the same to the other defendants, states a cause of action. *Norgren v. Jordan*..... 437
2. SAME—PLEADING—TENDER—NECESSITY. The complaint in an action to cancel the assignment of a school land contract, assigned in trust to secure advances, is sufficient without alleging a tender of the advances, where it appears that a tender would have been futile and the complaint alleges a readiness to repay all advances and interest. *Norgren v. Jordan*..... 437
3. SAME—AMENDMENT OF PLEADING—APPEAL—HARMLESS ERROR. A complaint in an action to cancel the assignment of a school land contract, assigned to secure advances, is sufficient without alleging that the assignment was intended as a mortgage; and requiring an amendment to that effect is harmless error and the amendment immaterial. *Norgren v. Jordan*..... 437
4. SAME—GROUNDS—FRAUD—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY. An assignment of a school land contract, as security for the repayment of advances to be made, is not shown to be fraudulent as to creditors by reason of recitals in an instrument claimed to have been contemporaneous and dictated by the debtor making the assignment, when it appears more likely to have been made subsequently and drawn up by the assignee and misunderstood by the debtor, and where the creditors were informed of and consented to the assignment, and the assignee had agreed with all the principal creditors to advance money to pay their claims. *Norgren v. Jordan*..... 437
5. CANCELLATION OF INSTRUMENTS—DEFENSES—TRUSTS—ACCOUNTING—EVIDENCE OF PAYMENTS—SUFFICIENCY. In an action to set aside an assignment of a school land contract held in trust to secure advances, the evidence is insufficient to support a claim that \$2,000 was paid by the trustee upon taking the assignment, where the assignor claims that no payment was made, the assignment recited a consideration of one dollar, the assignee, who was a shrewd litigious business man, made no examination of the title, agreed to pay the debts of the assignor in excess of the amount paid on the contract, and took a receipt indicating that the transaction was absolutely fraudulent as to creditors, the alleged payment of \$2,000 being for interests amounting to but a mere shadow. *Norgren v. Jordan*..... 437
6. SAME. The evidence is insufficient to support a claim that \$500 was paid by a trustee holding an assignment of a school land contract to secure advances, where it was alleged that the sum was paid in currency to a broker for securing a sale of part of the lands, when no sale was effected and the commissions were never earned and the other evidence fails to support the claim. *Norgren v. Jordan*... 437

CANCELLATION OF INSTRUMENTS—CONTINUED.

7. **CANCELLATION OF INSTRUMENTS—COMPLAINT—SUFFICIENCY.** A complaint alleging joint ownership and right of possession to real property, an adverse holding by certain defendants under a deed that is void for want of delivery, a refusal of the co-owner to join in the action, who is accordingly made a defendant, states a cause of action for cancellation of the deed and recovery of the property. *Ambrose v. Moore* 463

CARRYING WEAPONS:

See **WEAPONS.**

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 17, 26-29.

1. **CERTIORARI—REMEDY BY APPEAL—ADEQUACY—OFFICERS—RIGHT TO OFFICE—REVIEW.** Certiorari lies to review a judgment determining the right to a public office where the remedy by appeal would be inadequate because the term of office would expire before the hearing. *State ex rel. Royse v. Superior Court*..... 616
2. **CERTIORARI—PROCEEDINGS—RECORD—TIME FOR RETURN—LACHES.** Certiorari to review a judgment of the superior court will be dismissed for want of due diligence in prosecution, where the record was not certified for more than two months after the time fixed therefor in the writ, no application for an extension was asked until nearly one month after the time had expired, and no appearance was made at the date set for considering the extension of time, but a return made sixteen days thereafter without leave; since the return is necessary to confer jurisdiction, and Bal. Code, § 5744, provides that the court shall fix the time, which thereupon becomes the law of the case. *State ex rel. North Shore Boom and Driving Co. v. Superior Court* 169

CHARACTER:

As requirement for custody of child, see **DIVORCE**, 6.

CHECKS:

Payment of forged paper, see **BANKS AND BANKING**.

CIRCUMSTANTIAL EVIDENCE:

See **ARSON**, 2.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CIVIL RIGHTS:

Deprivation of, see **CONSTITUTIONAL LAW**, 2.

CANCELLATION:

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ations, see CORPORATIONS, 7.

GENERAL ATTACK

ADULTERATION, 5, 8.

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ADULTERATION, see DIVORCE, 4.
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CONFESSION:

ADULTERATION IN ATTORNEY AND CLIENT, 3, 4.
ADULTERATION in general, see COUNTIES, 1.
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ADULTERATION taken for highway, see HIGHWAYS, 4.

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ADULTERATION JULY, 2.
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ADULTERATION property for public use, see EMINENT DOMAIN.

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ADULTERATION to cancellation of instrument, see CANCELLATION OF IN-
STRUMENTS, 2.
ADULTERATION to condemnation proceedings, see EMINENT DOMAIN, 15, 16.

CONDUCT:

ADULTERATION counsel in civil actions, see TRIAL, 3.

CONSTITUTIONAL LAW:

Prohibition against ownership of land by aliens, see ALIENS.
Appointment of county officers, see COUNTIES, 2.
Confinement of criminal acquitted because of insanity, see INSANE
PERSONS, 3.
Subjects and titles of statutes, see STATUTES, 1.

1. CONSTITUTIONAL LAW — RULES OF CONSTRUCTION. Contemporane-
ous construction of words and phrases used in the constitution should
have great weight in their construction. *State ex rel. Atkinson v.*
Evans

CONSTITUTIONAL LAW—CONTINUED.

2. CONSTITUTIONAL LAW—DEPRIVATION OF CIVIL RIGHTS—ACTIONS—EVIDENCE—SUFFICIENCY. In an action by a negro, ejected from a restaurant, the evidence does not sustain a cause of action for refusal of equality of civil rights, where the plaintiff in his testimony did not claim that the ejection was in any way due to his color and had theretofore always been properly served there. *Chase v. Knabel* 484
3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ANTI-TRADING STAMP ACT. State Const. art. 1, § 3, and the Fourteenth Amendment to the Federal constitution, providing that no person shall be deprived of property without due process of law, are violated by the anti-trading stamp act (Laws 1905, p. 376), making it a misdemeanor to sell or exchange property under an inducement or representations that an unidentified or chance prize or premium, or trading stamp or like device entitling the holder to receive a prize or redemption of stamps, is to be part of the transaction. *Leonard v. Bassindale*.. 301
4. CONSTITUTIONAL LAW—DUE PROCESS—WATERS—RIPARIAN RIGHTS. The statute of 1890 (Bal. Code, § 4114) providing that a person shall have the first right to the use of spring waters arising on his land, is unconstitutional as to riparian rights to the use of the waters for domestic purposes by lower proprietors whose lands were patented prior to the enactment of the statute; as it deprives them of their property without due process of law. *Nielson v. Sponer*.. 14

CONSTRUCTION:

- Of contracts, see CONTRACTS, 3-5.
- Of contract of sale, see SALES, 2.
- Of contract for charter, see SHIPPING.
- Of statutes, see STATUTES, 3.
- Construction and operation of instructions, see TRIAL, 6.

CONTEMPORANEOUS CONSTRUCTION:

- Of constitution, see CONSTITUTIONAL LAW, 1.

CONTINUANCE:

1. CONTINUANCE—ABSENCE OF WITNESS—SUFFICIENCY OF AFFIDAVIT. It is not an abuse of discretion to deny a continuance asked for on the ground of the absence of a witness when the affidavits did not show that the same evidence could not be procured from other witnesses. *Maloney v. Stetson & Post Mill Co.*..... 645
2. CONTINUANCE—PLEADING—AMENDMENT AT TRIAL—SURPRISE—DISCRETION. In an action for injuries sustained by a pedestrian in a collision with an automobile, it is not an abuse of discretion to refuse a continuance upon allowing a trial amendment to the complaint to show that the machine was driven by defendant's servant

CLAIMS:

- Against estate of insolvent corporations, see **CORPORATIONS**, 7.
- Against county, see **COUNTIES**, 1.
- For exemption, see **EXEMPTIONS**.

CLOUD ON TITLE:

- See **QUIETING TITLE**.

COLLATERAL ATTACK:

- On judgment, see **JUDGMENT**, 5, 8.

COMMISSIONS:

- Of broker, see **BROKERS**, 2.

COMMUNITY PROPERTY:

- Disposition on divorce, see **DIVORCE**, 4.
- In general, see **HUSBAND AND WIFE**, 3-6.

COMPENSATION:

- Of attorney, see **ATTORNEY AND CLIENT**, 3, 4.
- Of county officers in general, see **COUNTIES**, 1.
- For property taken for public use, see **EMINENT DOMAIN**, 14, 18-20, 29.
- For property taken for highway, see **HIGHWAYS**, 4.

COMPETENCY:

- Of juror, see **JURY**, 2.
- Of witnesses in general, see **WITNESSES**.

CONDEMNATION:

- Taking property for public use, see **EMINENT DOMAIN**.

CONDITIONS:

- Precedent to cancellation of instrument, see **CANCELLATION OF INSTRUMENTS**, 2.
- Precedent to condemnation proceedings, see **EMINENT DOMAIN**, 15, 16.

CONDUCT:

- Of counsel in civil actions, see **TRIAL**, 3.

CONSTITUTIONAL LAW:

- Prohibition against ownership of land by aliens, see **ALIENS**.
- Appointment of county officers, see **COUNTIES**, 2.
- Confinement of criminal acquitted because of insanity, see **INSANE PERSONS**, 3.
- Subjects and titles of statutes, see **STATUTES**, 1.
- 1. **CONSTITUTIONAL LAW — RULES OF CONSTRUCTION.** Contemporaneous construction of words and phrases used in the constitution should have great weight in their construction. *State ex rel. Atkinson v. Evans* 219

CONSTITUTIONAL LAW—CONTINUED.

2. CONSTITUTIONAL LAW—DEPRIVATION OF CIVIL RIGHTS—ACTIONS—EVIDENCE—SUFFICIENCY. In an action by a negro, ejected from a restaurant, the evidence does not sustain a cause of action for refusal of equality of civil rights, where the plaintiff in his testimony did not claim that the ejection was in any way due to his color and had theretofore always been properly served there. *Chase v. Knabel* 484
3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ANTI-TRADING STAMP ACT. State Const. art. 1, § 3, and the Fourteenth Amendment to the Federal constitution, providing that no person shall be deprived of property without due process of law, are violated by the anti-trading stamp act (Laws 1905, p. 376), making it a misdemeanor to sell or exchange property under an inducement or representations that an unidentified or chance prize or premium, or trading stamp or like device entitling the holder to receive a prize or redemption of stamps, is to be part of the transaction. *Leonard v. Bassindale*.. 301
4. CONSTITUTIONAL LAW—DUE PROCESS—WATERS—RIPARIAN RIGHTS. The statute of 1890 (Bal. Code, § 4114) providing that a person shall have the first right to the use of spring waters arising on his land, is unconstitutional as to riparian rights to the use of the waters for domestic purposes by lower proprietors whose lands were patented prior to the enactment of the statute; as it deprives them of their property without due process of law. *Nielson v. Sponer*.. 14

CONSTRUCTION:

- Of contracts, see CONTRACTS, 3-5.
- Of contract of sale, see SALES, 2.
- Of contract for charter, see SHIPPING.
- Of statutes, see STATUTES, 3.
- Construction and operation of instructions, see TRIAL, 6.

CONTEMPORANEOUS CONSTRUCTION:

- Of constitution, see CONSTITUTIONAL LAW, 1.

CONTINUANCE:

1. CONTINUANCE—ABSENCE OF WITNESS—SUFFICIENCY OF AFFIDAVIT. It is not an abuse of discretion to deny a continuance asked for on the ground of the absence of a witness when the affidavits did not show that the same evidence could not be procured from other witnesses. *Maloney v. Stetson & Post Mill Co.*..... 645
2. CONTINUANCE—PLEADING—AMENDMENT AT TRIAL—SURPRISE—DISCRETION. In an action for injuries sustained by a pedestrian in a collision with an automobile, it is not an abuse of discretion to refuse a continuance upon allowing a trial amendment to the complaint to show that the machine was driven by defendant's servant

CONTINUANCE—CONTINUED.

instead of by defendant, and to show that the driving was "negligent" in addition to being "wilful," where, on application for continuance by defendant on the ground of surprise, no showing was made that defendant could not safely go to trial. *Lampe v. Jacobsen* 533

CONTRACTS:

Sufficiency of performance, see **BROKERS**, 2.

For profits, time of performance, see **BROKERS**, 3.

Cancellation, see **CANCELLATION OF INSTRUMENTS**, 1-6.

Damages for breach, see **DAMAGES**, 1, 2, 6.

Parol agreement as constituting easement by prescription, see **EASEMENTS**, 1.

Rescission after payment on account, see **ESTOPPEL**, 5.

Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.

Of Indians, see **INDIANS**.

Of insurance in general, see **INSURANCE**.

Of marriage, see **MARRIAGE**.

Sharing in profits as constituting partnership, see **PARTNERSHIP**, 1.

Discharge of surety on building contract by change in obligation of principal, see **PRINCIPAL AND SURETY**.

Sales of personalty, see **SALES**.

Charter agreement, see **SHIPPING**.

Specific performance, see **SPECIFIC PERFORMANCE**.

Sale of land, see **VENDOR AND PURCHASER**.

1. **CONTRACTS—MUTUALITY—ACCEPTANCE.** A letter offering employment for one year is a complete contract as soon as accepted, and there is no lack of mutuality after beginning performance. *Schultz v. Simmons Fur. Co.* 555
2. **CONTRACTS—DELIVERY—EXECUTION—EVIDENCE—SUFFICIENCY.** In an action upon a contract signed by and in the handwriting of a person since deceased, the contract is admissible in evidence where it shows on its face that it was for the benefit of plaintiff who had had possession of it for a long time and ever since its date, execution and delivery being presumed from such facts. *Kauffman v. Baillie* 248
3. **CONTRACTS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN—CONSTRUCTION—QUESTION FOR JURY.** A letter offering employment to a fur cutter at \$25 a week for the "busy season" and \$20 for the "dull season" is ambiguous, authorizing the admission of oral evidence to explain the terms as used in the fur trade, making the interpretation of the contract a question for the jury. *Schultz v. Simmons Fur Co.* 555

CONTRACTS—CONTINUED.

4. **SAME—TERMS OF CONTRACT.** A letter offering employment to a fur cutter, dated October 28, 1905, stating that "I have no doubt that it will be all year round" and ending, "I will give you \$25 a week for six months for the busy season and give you \$20 a week for the dull season," is properly construed by the jury to be a contract of employment for one year, when it is explained by the oral testimony that the six months of the busy season were the following November and December of that year, and January, August, September and October of the next year, since in no other way could effect be given to the promise to pay \$25 a week for six months. *Schultz v. Simmons Fur Co.*..... 555
5. **CONTRACTS—SALES—CONSTRUCTION—QUESTION FOR JURY.** Where the meaning of a clause in a contract to sell goods at "sixty-five cents on the dollar" is uncertain, and evidence is offered by both parties to explain it, the construction of the same is a question for the jury and not one of law for the court. *Moritz v. Herskovitz*..... 192

CONTRIBUTORY NEGLIGENCE:

- See NEGLIGENCE, 4.
 Of servant, see MASTER AND SERVANT, 5, 6.
 Of traveler in street, see MUNICIPAL CORPORATIONS, 18.
 Of person injured by street car, see STREET RAILROADS, 4.

CONVERSION:

- Of stock by corporate officer, see CORPORATIONS, 1, 2.

CONVEYANCES:

- By husband in fraud of wife's marital rights, see HUSBAND AND WIFE, 5.
 Sale of lands allotted to Indians, see INDIANS, 1.
 Mortgaged property, see MORTGAGES, 4, 5.
 Of rights in public lands, see PUBLIC LANDS, 2.

CORAM NOBIS:

- Writ of error coram nobis, see CRIMINAL LAW, 6.

CORNERS:

- Location of, see BOUNDARIES, 2.

CORPORATIONS:

- Condemnation of corporate property for public use, see EMINENT DOMAIN, 6, 7, 9.
 Municipalities, see MUNICIPAL CORPORATIONS.

CORPORATIONS—CONTINUED.

1. CORPORATIONS—STOCK—ISSUANCE—FRAUD OF OFFICERS—CANCELLATION OF SPURIOUS STOCK. Where stock purchased on the open market was sent by the buyer to the secretary of the corporation for the purpose of cancellation and reissue, but was fraudulently used otherwise by the secretary, who forged and issued spurious stock in lieu thereof, the corporation is bound by such wrongful issue and is not entitled to have the same cancelled. *Dreyfus Mining Co. v. Willard* 345
2. SAME—PRINCIPAL AND AGENT. A corporation is entitled to the cancellation of spurious stock wrongfully issued by its secretary, where the original stock came into his hands as a broker before he became secretary, under directions from the owner to take it to the company for reissue, but was otherwise disposed of by him, and the spurious stock was afterwards wrongfully issued after he became secretary; also, where the secretary was authorized to buy stock on the open market and have the same reissued, but instead of doing so he otherwise disposed of the same and fraudulently issued spurious stock in lieu thereof; also, where the secretary individually borrowed money and fraudulently issued spurious stock which he pledged as collateral security therefor; since, as to stock never in the possession of the owners, and as to which the owners dealt with the secretary as their agent, the agent's interest being adverse to that of the company, the company is not bound by the acts of the secretary. *Dreyfus Mining Co. v. Willard*..... 345
3. CORPORATIONS—NOTES—OFFICERS—AUTHORITY AND CONSIDERATION—PLEADING. A complaint alleging an indebtedness by a corporation, and the execution and delivery of a note therefor, reciting that it was for value received, sufficiently alleges consideration for the note and execution by the corporation without stating the authority for the execution, which is matter of defense. *McKinley v. Mineral Hill Consol. Mining Co.*..... 162
4. SAME—APPARENT AUTHORITY. Where a note was executed by the president and general manager of a corporation in the presence of its officers and board of trustees, the corporation is liable thereon, unless it shows affirmatively that the act was unauthorized. *McKinley v. Mineral Hill Consol. Mining Co.*..... 162
5. SAME—RATIFICATION—RECEIPT OF BENEFITS. A corporation cannot set up want of authority in its president to execute a note, where it had received benefits by way of money advanced and services rendered for which the note was given. *McKinley v. Mineral Hill Consol. Mining Co.*..... 162
6. CORPORATIONS—REPRESENTATION—AUTHORITY OF MANAGER—PLEADING. In an action upon a contract executed by the manager of the defendant corporation, an answer alleging that the signing, and

CORPORATIONS—CONTINUED.

whatever was done in the matter was done by the corporation by its manager, admits that the manager was authorized to make the contract for the corporation, and no proof thereof is required. *Belch v. Big Store Co.*..... 1

7. **CORPORATIONS—RECEIVERS—COLLECTION OF ASSETS.** In an action by a receiver of a corporation to recover money misappropriated by an officer of the corporation, a nonsuit should not be granted for failure to show that the receiver was the owner of the claim, where plaintiff's evidence did not affirmatively show that the corporation had parted with its interest therein. *Richardson v. Agnew*..... 117

COSTS:

1. **COSTS—ON APPEAL.** Where appellants claimed more than they were entitled to, but successfully defended against respondent's cross-appeal, the supreme court, on modifying the judgment, will award costs in the court below to the respondents, and the costs on appeal to the appellants. *Schmidt v. Olympia Light and Power Co.*.... 360
2. **COSTS—TAXATION—APPEAL—WAIVER OF OBJECTIONS.** Error cannot be predicated on the taxation of costs, where the motion to retax was not filed until three months after the taxation. *Moritz v. Herskovitz* 192

CO-TENANCY:

See TENANCY IN COMMON.

COUNCIL:

See MUNICIPAL CORPORATIONS.

COUNSEL:

See ATTORNEY AND CLIENT.

COUNTIES:

Power of county commissioners to lay out public highways, see HIGHWAYS, 2, 3.

Mandamus to compel payment of county funds, see MANDAMUS, 3.

1. **COUNTIES—CLAIMS—PRESENTATION—COMPENSATION OF FRUIT INSPECTOR.** Laws 1903, p. 246, providing that the commissioner of horticulture shall issue his certificate showing the number of days work performed by county fruit inspectors, who shall thereupon receive pay at \$4 per day from the county, does not obviate the necessity of presenting a claim therefor to the county commissioners for allowance before the auditor shall draw a warrant, as required by Bal. Code, § 393, in all cases except for cost and fee bills required by law to be approved by some other judicial tribunal or officer; since the exception applies only to courts, and the law of 1903, does not provide for a warrant by the auditor on the certificate of the commissioner of horticulture. *State ex rel. Egbert v. Blumberg*. 270

COUNTIES—CONTINUED.

2. SAME—COUNTY OFFICERS—APPOINTMENT—STATUTES—CONSTITUTIONALITY. Laws 1903, p. 246, creating the office of county fruit inspector, to be appointed by the county commissioners for a term of two years, violates the mandatory provisions of the Const., art. 1, § 29, requiring all county officers to be elected, and is void. *State ex rel. Egbert v. Blumberg*..... 270

COURTS:

- Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 35.
- Instructions as comment on facts, see CRIMINAL LAW, 2, 3, 7.
- Custody of children in divorce suit, see DIVORCE, 5-7.
- Condemnation proceedings, see EMINENT DOMAIN, 22.
- Administration proceedings, see EXECUTORS AND ADMINISTRATORS.
- Conclusiveness of judgments, see JUDGMENT, 10-17.
- Prohibiting judicial proceedings, see PROHIBITION.
- Correction of mistake in verdict, see TRIAL, 10.

CREDITORS' SUIT:

- Form of action, abolishment of distinctions, see ACTION, 1.
- Conclusiveness of findings on appeal, see APPEAL AND ERROR, 31.

CRIMINAL LAW:

- See ARSON; LARCENY.
- Misjoinder of causes of action, see ACTION, 2.
- Confinement of persons acquitted on ground of insanity, see INSANE PERSONS, 2-5.
- Violation of liquor laws, see INTOXICATING LIQUORS.
- Malicious prosecution, see MALICIOUS PROSECUTION.
- Prosecution for violation of municipal ordinances and regulations, see MUNICIPAL CORPORATIONS, 13-15.
- Offenses relating to weapons, see WEAPONS.
1. CRIMINAL LAW—TRIAL—ORDER OF PROOF—DISCRETION. The order of admitting proof, before establishment of the *corpus delicti*, is within the discretion of the trial court. *State v. Gohl*..... 408
 2. SAME—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. An instruction defining what would be employing an armed body of men, and authorizing the jury to find the defendant guilty if they believed that he committed specified acts constituting the offense within the definition, is not objectionable as a comment on the facts. *State v. Gohl* 408
 3. SAME. An instruction stating the evidence which had been introduced by the parties in support of their claims is a comment on the facts, and reversible error, if prejudicial. *State v. Gohl*..... 408

CRIMINAL LAW—CONTINUED.

4. **CRIMINAL LAW—APPEAL—REVIEW.** A general exception to an instruction in a criminal case containing several propositions is insufficient if the instruction is in part correct. *State v. Gohl*..... 408
5. **CRIMINAL LAW—TRIAL—VERDICT—MISTAKE.** Where it is evident from the verdict that the jury has made a mistake in the name of the only defendant found guilty, it is not error to require the three defendants to stand up and be identified. *State v. Moran*..... 596
6. **CRIMINAL LAW—WRIT OF CORAM NOBIS—WHEN ISSUES.** The writ of *coram nobis* will not issue to set aside a judgment of conviction upon the ground that the testimony of the defendant was given under a misapprehension and was believed by him to be true owing to misrepresentations of his partner and codefendant, who is now dead, and who confessed to the crime after the trial and to misleading the defendant into giving the false testimony. *Wilson v. State*..... 416
7. **SAME—APPEAL—HARMLESS ERROR.** Where in a criminal trial, the judge commented on the facts by stating that certain evidence had been produced to sustain certain claims, it sufficiently appears to be error without prejudice when such facts had been testified to by the appellant and other witnesses and were uncontradicted. *State v. Gohl*..... 408

CROSS-APPEALS:

See **APPEAL AND ERROR**, 5.

CROSS-EXAMINATION:

As to value of property, see **EMINENT DOMAIN**, 18.

CROSSINGS:

Accident at street railroad crossings, see **STREET RAILROADS**.

CUSTODY:

Of children, see **DIVORCE**, 5-7.

CUSTOMS AND USAGES:

1. **CUSTOMS AND USAGE—SALES—EVIDENCE—ADMISSIBILITY.** Upon a sale of merchandise at D. for a certain per cent of their cost, it is not error to exclude evidence of a particular custom at D. to add freight charges to the cost, where it was not shown that the vendee knew of the custom, and evidence was received of the general custom, throughout the state which did not differ from the custom at D. *Moritz v. Herskovitz*..... 192

DAMAGES:

In action for assault, see **ASSAULT AND BATTERY**.

For death, see **DEATH**.

Condemnation of property taken for public use, see **EMINENT DOMAIN**, 14, 18-20, 29.

DAMAGES—CONTINUED.

Construction or repair of highways, see HIGHWAYS, 4.

For fraudulent sale of partnership property, see PARTNERSHIP, 3.

For price of goods sold, see SALES, 4.

Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 10-13.

1. DAMAGES—MENTAL SUFFERING—TORTS—PLEADING. Damages may be recovered for mental suffering inflicted by the wrongful or improper burial of plaintiffs' dead child, under a complaint alleging breach of contract to make proper burial, where the facts stated show a tort or injury to the person. *Wright v. Beardsley*..... 16
2. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS. In an action to recover damages for breach of a contract to employ a plumber for one year to conduct the defendant's plumbing business, at the agreed compensation of \$4 per day and one-half the net profits of the business, the plaintiff is entitled to substantial damages for prospective profits, and a verdict of \$400 will not be disturbed where there was evidence that the business was the continuation of an established business, which had not been conducted at a loss, and of other circumstances affecting the subject. *Belch v. Big Store Co.* 1
3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$500 for injuries to the driver of a delivery wagon, from a fall from his wagon, is not excessive, although the injuries were not permanent, where he expended \$75 for medical attendance and assistance, was kept from his work for six weeks, part of the time in bed, and suffered severely from contusions and wounds. *Norman v. Bellingham* 205
4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,025 for personal injuries received in a fall into an unguarded hole in a sidewalk, resulting in bruises and the breaking of several ribs, will not be set aside as excessive where there was nothing to indicate passion or prejudice. *Ashley v. Aberdeen*..... 385
5. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES. A verdict for \$4,000 for the crushing of a leg, resulting in a compound fracture of the tibia, a simple fracture of the fibula, and a present shortening of the leg, reduced by the trial court to \$3,000, is not excessive, although the injuries may not be permanent. *Maloney v. Stetson & Post Mill Co.*..... 645
6. DAMAGES—EXCESSIVE VERDICT—NEW TRIAL. A verdict for \$2,510 for damages for the wrongful burial of plaintiff's dead child is so excessive as to show passion or prejudice, entitling the defendants to a new trial, where it appears that the child was born at a hospital and died five days later, that the defendants were informed that the plaintiffs were poor and could not afford a costly funeral,

DAMAGES—CONTINUED.

and would probably want to bury the body permanently at some other place, and the body was buried in a lot used for stillborn infants, on top of another coffin, about eight inches deep, and was not molested in any way, until pointed out to and removed by the plaintiffs to another lot in the same cemetery. *Wright v. Beardsley*.. 16

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT, 2, 3, 9-12.

DEATH:

As ground for vacation of judgment, see JUDGMENT, 5.

1. **DEATH—RIGHT OF ACTION—HUSBAND AND WIFE—DAMAGES—FUNERAL EXPENSES.** A husband can recover for his loss of time and funeral expenses resulting from the wrongful death of his wife, irrespective of statutes. *Philby v. Northern Pac. R. Co.*..... 173

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

Testimony as to transactions with persons since deceased, see WITNESSES.

DECISION:

On appeal, See APPEAL AND ERROR, 36.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 1-3.

DEDICATION:

1. **DEDICATION—PLAT—CONSTRUCTION—REVOCATION BY SUPPLEMENTAL PLAT.** Where an owner of land in dedicating an addition to a city, filed a plat designating his south boundary as the center line of a street sixty-six feet wide, when in fact the street and lots as staked out diverged from such boundary line, the lots being 33 feet from the line of the street at one corner and 44 feet distant at the lots in question, the excess is part of the street and is not to be added to the lots where the plat describes the streets as sixty-six feet in width; and the owner cannot, after acceptance of the plat, show a contrary intention or alter the dedication by the filing of a supplemental plat. *La Bounty v. Seattle*..... 141

DEEDS:

Cancellation, see CANCELLATION OF INSTRUMENTS, 7.

Estoppel by deed, see ESTOPPEL, 1, 2, 4.

Parol or extrinsic evidence contradicting or varying deed, see EVIDENCE, 6.

Recitals as affecting community nature of property, see HUSBAND AND WIFE, 6.

DEEDS—CONTINUED.

Absolute deed as mortgage, see **MORTGAGES**, 1-3.

Reformation, see **REFORMATION OF INSTRUMENTS**.

Tax deeds, see **TAXATION**, 4.

To territory, see **TERRITORIES**.

As notice to purchaser, see **VENDOR AND PURCHASER**, 4-7.

1. **DEEDS—DESCRIPTION—CERTAINTY.** A description in a deed of land in a certain donation claim, naming the section, township, range, and county, is not void for uncertainty in that it omitted the name of the town in stating the point of commencement at the corner of certain streets, as sufficient remains to accurately locate the land. *Sylvester v. State*..... 585
2. **DEEDS—RESERVATIONS—MISTAKE.** Where a deed to a subservient estate reserved a water right as granted by a prior deed, referring to the record thereof, but described as excepted from the grant a greater volume of water than was granted by the prior deed, subsequent deeds in the chain of title to the water describing the lesser volume of water indicate the abandonment or surrender of the greater volume of water, or that the reservation of such greater volume was by mistake; especially where a corrected deed of the water right, made some time after, described only the lesser volume of water. *Schmidt v. Olympia Light and Power Co.*..... 360

DEFAMATION:

See **LIBEL AND SLANDER**.

DELIVERY:

Of contract, see **CONTRACTS**, 2.

Of building material, see **MECHANICS' LIENS**.

DEPARTURE:

See **PLEADING**, 1.

DESCENT AND DISTRIBUTION:

Administration of estates of decedents, see **EXECUTORS AND ADMINISTRATORS**.

Rights in homestead, see **HOMESTEAD**.

DESCRIPTION:

Of property in deed, see **DEEDS**, 1.

DISCRETION OF COURT:

Review in civil actions, see **APPEAL AND ERROR**, 18-20.

To grant continuance, see **CONTINUANCE**, 2.

As to order of proof, see **CRIMINAL LAW**, 1.

Examination of jurors, see **JURY**, 2.

New trial, see **NEW TRIAL**.

Reopening case for further evidence, see **TRIAL**, 1.

DISMISSAL AND NONSUIT:

Judgment of dismissal as *res adjudicata*, see JUDGMENT, 10, 11.
 Dismissal of appeal, see APPEAL AND ERROR, 6, 8, 10.
 At trial, see TRIAL, 5.

DIVORCE:

Findings justifying decree, see APPEAL AND ERROR, 28.
 Annulment of marriage, see MARRIAGE.

1. **DIVORCE—GROUNDS—NONSUPPORT.** Nonsupport by an able-bodied husband, earning good wages, which were spent for liquor, without any excuse for the neglect, constitutes statutory ground for a divorce. *Seigmund v. Seigmund*..... 572
2. **DIVORCE—JUDGMENT—ENTRY NUNC PRO TUNC—ESTOPPEL.** A plaintiff in a divorce case, who, after oral announcement of a decree in her favor, settled her differences with her husband and requested that the decree be not entered, and three years later secured another decree of divorce making a different disposition of the property, is not entitled to have a *nunc pro tunc* order for the entry of the first decree; since such an order to correct a record is discretionary, and since she abandoned her right thereto, and third persons have acquired interests under the subsequent decree which would be injuriously affected. *State ex rel. Tufton v. Superior Court* 395
3. **SAME—ENTRY OF DECREE—WHAT CONSTITUTES.** An oral announcement for a decree of divorce and disposition of property, followed by the clerk's minutes thereof, which did not state the grounds for the divorce or the disposition of the property, cannot be regarded as a decree, where written findings and a decree were prepared but not signed by the judge or entered because the parties had made up their differences and resumed their marriage relations. *State ex rel. Tufton v. Superior Court*..... 395
4. **DIVORCE—DISPOSITION OF PROPERTY—COMMUNITY PROPERTY.** A decree can make no disposition of the property of the spouses where it is not brought before the court, and failure to do so renders community property the common property of the divorced parties, and waives the right to which the parties might be entitled on considering the merits in the divorce action. *Ambrose v. Moore*..... 463
5. **DIVORCE—CUSTODY OF CHILD—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY.** Upon application of a mother for modification of a decree of divorce awarding the custody of a child to a stranger, to which she had consented owing to her then poor health, proof that she is now able to provide for the child authorizes the court to award her its custody without any showing that the welfare of the child demands the change. *Curtis v. Curtis*..... 664

DIVORCE—CONTINUED.

6. **SAME—FITNESS OF MOTHER.** Upon application of a mother for modification of a decree of divorce, to gain possession of a child, specific acts which occurred long before her marriage, and then known to her husband, are not sufficient to show her unfitness to have custody of the child. *Curtis v. Curtis*..... 664
7. **SAME—CONSENT TO DECREE—EFFECT—MODIFICATION.** A stipulation in a divorce case as to the custody of a child amounts to no more than evidence, and does not estop the party from subsequently moving for a modification of the decree. *Curtis v. Curtis*..... 664

DOCUMENTS:

As evidence in civil actions, see **EVIDENCE**, 4.

DOMICILE:

As affecting community nature of property, see **HUSBAND AND WIFE**, 3.
 Evidence of nonresidence, see **JUDGMENT**, 9.

DRAFTS:

As property subject to garnishment, see **GARNISHMENT**.

DRAINS:

Mandamus to compel payment of warrants, see **MANDAMUS**, 2.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 3, 4.
 Confinement of criminal acquitted because of insanity, see **INSANE PERSONS**, 2-5.

EARNINGS:

Of wife as separate estate, see **HUSBAND AND WIFE**, 1.

EASEMENTS:

- See **DEDICATION**; **HIGHWAYS**.
 Subject to eminent domain, see **EMINENT DOMAIN**, 9, 13.
 Restrictions of rights in condemnation, see **EMINENT DOMAIN**, 1, 13.
 Estoppel to acquire title, see **ESTOPPEL**, 4.
 Licenses in respect to real property, see **LICENSES**.
 Obstructions and encroachments on city streets, see **MUNICIPAL CORPORATIONS**, 17.
1. **EASEMENTS—BY PRESCRIPTION—PAROL GRANT—LICENSE.** Verbal authority to conduct and impound water for a water power, granted by the occupant of land under agreement to make a deed upon acquiring title, in consideration of the grantee's constructing and operating a sawmill on his adjoining land, is more than a revocable license, and amounts to an easement by prescription, where the grantor acquiesced in the incurring of expense and in such use of the land for twenty-five years. *Lechman v. Mills*..... 624

EASEMENTS—CONTINUED.

2. **SAME—PRESUMPTIONS—ADVERSE POSSESSION.** The continued use of a canal for 25 years across the lands of another for a water power for extensive mills on adjoining land is presumed to be adverse, until the contrary is shown. *Lechman v. Mills*..... 624
3. **SAME—ORAL GRANT.** An easement by prescription, used under claim of right for the statutory period, is not deprived of its adverse character by reason of the fact that it was originally granted by parol. *Lechman v. Mills*..... 624

EJECTMENT:

Recovery of land omitted in former action, see JUDGMENT, 15.

ELECTION:

Time for taking property in condemnation proceedings, see EMINENT DOMAIN, 24.

ELECTIONS:

Submission of question of issuing municipal bonds, see MUNICIPAL CORPORATIONS, 21.

EMINENT DOMAIN:

Damages for construction of highway, see HIGHWAYS, 4.

1. **EMINENT DOMAIN—PUBLIC USE—RESTRICTIONS AS TO RAILWAY STATIONS.** The public use, and the right of a railway company to acquire right of way through a district 10 or 12 miles long, are not affected by the fact that, in order not to contaminate a city water supply, the company has agreed not to maintain stations or receive or take on passengers in such limited district, where the same appears to be a reasonable health requirement. *State ex rel. Kent Lumber Co. v. Superior Court*..... 516
2. **SAME—PARTIES ENTITLED—POWERS OF CORPORATION—PUBLIC AND PRIVATE USES.** Condemnation of land to develop power for street car and electric lighting purposes cannot be objected to on the ground that the company's articles of incorporation authorizes it to sell electric light to the public, which was not a public use, thereby easily evading detection in wrongfully using the power for private purposes, where the petition and testimony show that the lands sought to be condemned are necessary for a public use, and especially where the evidence shows that the amount used for private purposes could be readily ascertained. *State ex rel. Harris v. Olympia Light and Power Co.*..... 511
3. **EMINENT DOMAIN—PARTIES ENTITLED—FOREIGN CORPORATIONS—RAILROADS TOUCHING STATE—STATUTES—CONSTRUCTION.** Laws 1889-90, p. 525, § 3, relating to the right of railroads whose lines touch the state, which provides that such a corporation complying with the act shall have all the rights and privileges to extend its lines

EMINENT DOMAIN—CONTINUED.

into the state that it would have had if it had been authorized so to do by filing articles of incorporation, in accordance with the general laws of the state (Code, 1881, § 2478), recognizes the legal right of a foreign corporation to construct lines in the state, although it had no line touching the state; and a general law subsequently taking effect (Laws 1889-90, p. 288) completely covering the latter subject-matter, would likewise authorize foreign corporations to construct lines in the state, although not coming within the provisions of the special act relating to the extension of lines touching the state. *State ex rel. Miller v. Griffin*..... 489

4. EMINENT DOMAIN—PARTIES ENTITLED—IRRIGATION—PRIORITY. An irrigation company, which commenced its construction of a canal in January, 1905, had expended a large amount of money in construction work before the organization of another company in 1906, and in two years had expended \$38,000 and was provided with ample means to complete the work, is shown to have been proceeding in good faith and diligently, and has a prior right to condemn waters of a stream which are not sufficient for both companies. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court*..... 500
5. EMINENT DOMAIN—POWER PURPOSES—FLOODING LAND. Condemnation for the purpose of developing power for street car and electric light purposes is authorized where it is sought to raise the waters in a lake to be used as a reservoir during the summer months when the supply was inadequate, and the land sought to be condemned would be covered by such raising of the waters of the lake. *State ex rel. Harris v. Olympia Light and Power Co.*..... 511
6. EMINENT DOMAIN—PROPERTY SUBJECT—PRIVATE ROAD—PUBLIC USE. A railroad operated by a lumber company is a private enterprise and the right of way is subject to condemnation, where it appears that it was built six miles through a timbered country tributary to no public business, and used only for private business of the lumber company, although the company was authorized to carry freight and passengers. *State ex rel. Kent Lumber Co. v. Superior Court* 516
7. SAME—PREVIOUSLY DEVOTED TO PUBLIC USE—RAILROAD CROSSINGS. Under Bal. Code, § 4335, one railroad may condemn a crossing over, or part of the right of way of, another road if there is a necessity therefor and the same can be taken without material detriment to the established road. *State ex rel. Kent Lumber Co. Superior Court* 516
8. SAME—RAILROAD CROSSINGS—NECESSITY. The necessity for condemning a railroad crossing or parts of a right of way, is a reasonable necessity. *State ex rel. Kent Lumber Co. v. Superior Court*. 516

EMINENT DOMAIN—CONTINUED.

9. SAME—PROPERTY SUBJECT—EASEMENTS—MUNICIPAL CORPORATIONS—DISPOSAL OF PROPERTY. A right of way granted to a city for a pole line may be condemned for a railway right of way, where the city consents and the two uses can run together; since the city can dispose of its property, and the interests of the owner of the fee after grant of an easement are subject to condemnation. *State ex rel. Kent Lumber Co. v. Superior Court*..... 516
10. SAME—PROPERTY SUBJECT—RIPARIAN RIGHTS. The common law rights of riparian owners to the natural flow of waters of a non-navigable stream are subject to condemnation for irrigation purposes under Bal. Code, § 4143, except as to the water that is used or needed by himself for the purpose of irrigation, as provided in *Id.*, § 4156. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court* 500
11. SAME—TRANSFER OF RIPARIAN RIGHTS—PRIORITY BETWEEN IRRIGATION COMPANIES. Where an irrigation company, prior in point of time, was already in good faith prosecuting its construction work for the use of the waters of a stream, another company acquiring riparian rights for the use of the same waters takes such rights subject to the right of condemnation existing against the riparian owners in favor of the prior company; since, as between two companies seeking to use the same waters, the one prior in time is prior in right, and the fact that the later company is a public carrier does not enlarge its riparian rights. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court*..... 500
12. SAME—TEMPORARY PURPOSES. Condemnation of land to develop power for street car and electric lighting purposes cannot be objected to as being for a merely temporary purpose, from the fact that in six years more power would probably be required, where no intention is shown to abandon the same at such time. *State ex rel. Harris v. Olympia Light and Power Co.*..... 511
13. SAME—RESTRICTION ON EASEMENT. An appropriator may limit by stipulation the rights or easements sought in condemnation proceedings. *State ex rel. Kent Lumber Co. v. Superior Court*..... 516
14. SAME—DAMAGE TO OTHER LANDS—DIVERSION OF WATER. A condemnation of land for the purpose of developing a water power is not objectionable on the ground that it will damage other lands by diverting water therefrom, where it is only proposed to divert water during the freshets and high water. *State ex rel. Harris v. Olympia Light and Power Co.*..... 511
15. SAME—PRIORITY—NECESSITY OF PRIOR CONDEMNATION PROCEEDINGS. Where an irrigation company is openly and in good faith prosecuting the construction of its ditch for the use of the waters of a stream, it is not necessary that it should have previously con-

EMINENT DOMAIN—CONTINUED.

- demned its water rights to give it priority over another company lower down on the stream subsequently seeking the use of the same waters. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court* 500
16. SAME. Laws 1889-90, p. 718, § 42, providing that the appropriator of water rights seeking condemnation for irrigation purposes shall file a map of the location of its water ditch, etc., applies only to subd. 4 of the act relating to the "Right of Way for Ditches" of which it is a part; and upon a condemnation of water rights under subd. 5, entitled "On the Condemnation of Water Rights," it is not necessary to file any map of the location of the ditch, as the same is not required in the division of the law governing that matter. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court*..... 500
17. SAME—PROCEEDINGS—REVIEW — CERTIORARI — NOTICE — WAIVER OF OBJECTION. In proceedings to condemn water rights for irrigation, one who was personally served, and appeared and contested the matter without objection to the notice, cannot claim, on certiorari, lack of jurisdiction by reason of failure to give the notice by publication required by the act of 1889-90, p. 719, § 45. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court*..... 500
18. SAME—CROSS-EXAMINATION. Where, in condemnation proceedings, the court has permitted the defendant, on cross-examination of the relator's witnesses, to show the price paid by the relator for similar property, it is error to refuse to allow the relator to show all the facts and circumstances under which its agents purchased the same. *Port Townsend Southern R. Co. v. Barbare*..... 275
19. EMINENT DOMAIN—DAMAGES—MARKET VALUE—EVIDENCE. In condemnation proceedings the desire or unwillingness of the defendant to sell the land cannot be shown upon the question of its market value. *Port Townsend Southern R. Co. v. Barbare*..... 275
20. SAME—EVIDENCE—OTHER SALES. In condemnation proceedings, it is incompetent for the defendant, upon the issue as to the market value of the property, to show the price paid by the condemning party for similar property. *Port Townsend Southern R. Co. v. Barbare* 275
21. EMINENT DOMAIN—PROCEDURE—JURIES—STATUTES—REPEAL. Laws 1905, p. 270, providing a general method for the selection of juries in superior courts, expressly made applicable "whether in special proceedings or otherwise," and repealing all laws in conflict therewith, repeals the special procedure theretofore existing for summoning jurors in condemnation cases. *Oregon R. & Nav. Co. v. McCormick* 45
22. EMINENT DOMAIN — PROCEDURE — APPEAL — REVIEW. Under Bal. Code, § 5620, providing that, upon waiver of a jury, the issues shall be tried by the court, it is prejudicial error, where defendant in con-

EMINENT DOMAIN—CONTINUED.

- demnation proceedings has waived a jury by defaulting, to have the damages assessed by a jury which was not selected in the manner provided by law. *Oregon R. & Nav. Co. v. McCormick*..... 45
23. SAME—SELECTION BY JURY. Upon default in condemnation proceedings, it is the duty of the petitioner, on moving for a jury to assess damages, to see that the jury is selected in the manner required by law. *Oregon R. & Nav. Co. v. McCormick*..... 45
24. SAME—JUDGMENT—ENTRY—ELECTION. In condemnation proceedings, after an assessment of damages by the jury, judgment cannot be entered for the amount of the award before the relator's election to take the property, nor can the relator be required to make the election at once, but the same may be made within a reasonable time after the decree of appropriation. *Port Townsend Southern R. Co. v. Barbare* 275
25. SAME—DEFAULT—JUDGMENT. Appeal lies from a default judgment in condemnation proceedings for error in having the damages assessed by a jury not summoned in the manner required by law, without moving to vacate the judgment or having called the same to the attention of the trial court. *Oregon R. & Nav. Co. v. McCormick* 45
26. EMINENT DOMAIN—PROCEDURE—REVIEW—CERTIORARI. Certiorari lies to review an order adjudging necessity and public use in condemnation proceedings for a county road, as there is no remedy by appeal; the statute of appeals relating to proceedings in eminent domain permitting an appeal only from the award of damages, and Laws 1901, p. 213, allowing an appeal from adjudication of public use being unconstitutional because of defective title. *State ex rel. Pagett v. Superior Court*..... 35
27. SAME—SCOPE AND QUESTIONS REVIEWABLE. Whether a use is a public use is a judicial question, and the same is subject to review on a writ of certiorari in condemnation proceedings. *State ex rel. Pagett v. Superior Court*..... 35
28. EMINENT DOMAIN—REVIEW—CERTIORARI—ADEQUACY OF REMEDY BY APPEAL. Certiorari does not lie to review an adjudication of public use in condemnation proceedings instituted by a city of the third class; since, under Laws 1905, p. 84, § 50, providing that the procedure as to appeals therein shall be the same as in other civil actions, review thereof may be had upon appeal, and the adequacy of the remedy by appeal is not affected by the fact that it is not as speedy, when the delay does not deprive appellant of the fruits of the appeal. *State ex rel. Northern Pac. R. Co. v. Superior Court*..... 303
29. SAME—EXTENT OF CONDEMNATION—DAMAGES. Upon certiorari to review an adjudication of public use in a proceeding to condemn water rights for irrigation purposes, the respondent cannot urge

EMINENT DOMAIN—CONTINUED.

error in that the decree declared condemnation of waters part of which had already been appropriated and which would reduce the damages; since that question belongs to the hearing upon the subject of damages. *State ex rel. Kettle Falls Power etc. Co. v. Superior Court* 500

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of decree in divorce proceedings, see DIVORCE, 3.
Of judgment, see JUDGMENT, 4.

EQUITY:

See CANCELLATION OF INSTRUMENTS.
Abolition of distinctions as to form, see ACTION, 1.
Parties to suits for injunction, see INJUNCTION.
Suits to quiet title, see QUIETING TITLE.

EQUITABLE ESTOPPEL:

See ESTOPPEL.

ESCHEAT:

Lands held by alien, see ALIENS, 2.

ESTABLISHMENT:

Of highways, see HIGHWAYS.

ESTATES:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

To allege error in civil actions or proceedings, see APPEAL AND ERROR, 16.
By acts of attorney, see ATTORNEY AND CLIENT, 1.
To deny authority of corporate officer or agent, see CORPORATIONS, 5.
Right to correction of record by order nunc pro tunc, see DIVORCE, 2.
To deny validity of lease, see INDIANS, 2.
To declare forfeiture of insurance certificate, see INSURANCE, 3.
To enjoin obstruction of street, see MUNICIPAL CORPORATIONS, 17.
To allege breach of contract, see SHIPPING.

1. ESTOPPEL—BY DEED—ESTOPPEL AGAINST ESTOPPEL. Where two parties claim from the same grantor, and one is estopped by recitals in his chain of title and the other by recitals in his chain of title, the rights of the parties must be adjusted without regard to the estoppel. *Schmidt v. Olympia Light and Power Co.*..... 360

ESTOPPEL—CONTINUED.

2. **ESTOPPEL—BY DEED—CONDITIONS—STATES.** Where the state has absolute title to land held for a capitol site, but to correct a supposed defect in the title, took a quitclaim deed from the former owners, conditional that such deed should be void if the capitol was located elsewhere, the state is not estopped, by the condition in the second deed, to assert its title under the first deed after breach of such condition; as it was only provided that the quitclaim should be void, not that the whole title should revert. *Sylvester v. State*.. 585
3. **ESTOPPEL—AFTER-ACQUIRED TITLE.** Aid and consent in extending a walk and wires across a certain lot does not amount to an estoppel against the maintenance of the same, as against an after-acquired title in the lands. *Van Sticlen v. Muir*..... 38
4. **ESTOPPEL—DECREE ADJUDGING TITLE—PURCHASE UNDER—NOTICE—ACQUIESCENCE—VENDOR AND PURCHASER—DEEDS.** Where the owner of land first conveyed a one-acre tract together with a specified water right, and then conveyed a four-acre tract subject to the water right as described in the prior deed, the record of which was recited, but in the latter deed erroneously described the water as greater in volume than the amount conveyed in the prior deed, and upon foreclosure of a mortgage upon the four-acre tract, the extent of the water right was litigated between the mortgagees and the owners of the water right, and it was adjudged that the four-acre tract is subject to the lesser volume of water as described in the deed granting the same, one who stands by with notice of the foreclosure suit is estopped from afterwards acquiring title to the greater volume of water exempted from the grant of the four-acre tract, as against the purchaser at the foreclosure sale relying upon the adjudication that the land foreclosed was subject only to the lesser right. *Schmidt v. Olympia Light and Power Co.*..... 360
5. **ESTOPPEL—PAYMENT ON ACCOUNT—CONTRACTS—BREACH—REMEDY.** A payment on account, prior to the completion of a contract, does not estop the payor from repudiating the contract upon a complete breach thereof by the other party. *Graham v. Bell-Irving*..... 607

EVIDENCE:

- Review of rulings as dependent upon prejudicial nature of error, see **APPEAL AND ERROR**, 33, 34.
- Sufficiency in prosecution for arson, see **ARSON**, 2.
- For attorney's fee, see **ATTORNEY AND CLIENT**, 3, 4.
- To establish boundaries, see **BOUNDARIES**, 2.
- In action for broker's compensation, see **BROKERS**.
- In suit for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 4-6.
- Of deprivation of civil rights, see **CONSTITUTIONAL LAW**, 2.
- Sufficiency of evidence of making of contract, see **CONTRACTS**, 2.
- To explain ambiguity in contract, see **CONTRACTS**, 3.

EVIDENCE—CONTINUED.

- Reception at trial, see CRIMINAL LAW, 1.
- As to existence and knowledge of customs, see CUSTOMS AND USAGES.
- Sufficiency for modification of decree, see DIVORCE, 5.
- Value of property in condemnation proceedings, see EMINENT DOMAIN, 18-20.
- Validity of execution, see EXECUTION.
- Insanity, see INSANE PERSONS, 1.
- Want of jurisdiction, see JUDGMENT, 9.
- For libel, see LIBEL AND SLANDER.
- For malicious prosecution, see MALICIOUS PROSECUTION.
- Of marriage, see MARRIAGE.
- Cause of servant's death, see MASTER AND SERVANT, 8.
- In action for injuries to servant, see MASTER AND SERVANT.
- To enforce mechanics' lien, see MECHANICS' LIENS.
- To show deed absolute on its face a mortgage, see MORTGAGES, 1-3.
- Validity of assessment for public improvements, see MUNICIPAL CORPORATIONS, 8.
- Negligence causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 18-20.
- In action for damages caused by negligence, see NEGLIGENCE, 2, 3.
- Of damages by fraudulent sale of partnership property, see PARTNERSHIP, 3.
- Existence of agency, see PRINCIPAL AND AGENT.
- In suits to quiet title, see QUIETING TITLE, 4.
- For injuries by fires set by railroad companies, see RAILROADS.
- In suit to reform written instrument, see REFORMATION OF INSTRUMENTS, 13, 14.
- For price of goods sold, see SALES, 4.
- To aid construction of contract of sale, see SALES, 1-3.
- In suit for specific performance, see SPECIFIC PERFORMANCE.
- Nonsuit on conflicting evidence, see TRIAL, 5.
- Objections to evidence at trial, see TRIAL, 2.
- Reception at trial, see TRIAL, 1.
- In action for damages for breach of contract, see VENDOR AND PURCHASER, 11, 13.
- In action to enjoin obstruction of waterways, see WATERS AND WATER COURSES, 2.
- Admissibility of evidence as to transactions with decedent, see WITNESSES.
- Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE—DECLARATIONS—RES GESTAE. Upon a dispute as to the construction of a contract, a letter from the appellant's attorney to the respondent, setting out appellant's version of the transaction, is inadmissible as a self-serving declaration, is no part of the *res gestae*, and is immaterial as notice. *Moritz v. Herskovitz* 192

EVIDENCE—CONTINUED.

2. **EVIDENCE—DECLARATIONS OF THIRD PERSONS—ADMISSIONS—ACQUIESCENCE IN STATEMENTS.** Where two women, the plaintiff and another, had been thrown from a buggy by a street car collision, evidence of a statement as to the blame for the accident, made by plaintiff's companion in her presence immediately upon regaining consciousness, is not admissible as an admission by plaintiff on the ground that it was not contradicted, where it appears that the plaintiff was seriously injured and hysterical at the time. *McCord v. Seattle Electric Co.*..... 145
3. **EVIDENCE—HEARSAY.** Declarations claimed to have been made to a disinterested witness by the vendor of logs, since deceased, are inadmissible as hearsay upon an issue as to the making of the sale. *Richardson v. Agnew*..... 117
4. **EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS OF LAND OFFICE.** A certified copy of a notification to the surveyor general of intent to claim land settled upon as a donation claim, from the general land office at Washington, D. C., establishes the date of the giving of such notice, clearly appearing thereon, although the local surveyor general's and register's offices contain no record of the filing thereof. *Sylvester v. State*..... 585
5. **EVIDENCE—MAPS—ADMISSIBILITY.** A map upon which a witness designated the location of objects is admissible in connection with his testimony where it is reasonably accurate. *Spokane v. Patterson* 93
6. **EVIDENCE—PAROL—DEEDS—CONDITION.** It is inadmissible to prove that by a parol contemporaneous contract an absolute deed to a territory was made on condition that the territory should erect and maintain a capitol building on the land. *Sylvester v. State*..... 585
7. **EVIDENCE—PAROL—TO VARY TERMS OF LEASE.** In an action to cancel a lease, parol evidence is inadmissible to show a condition that would defeat its operative effect. *Morris v. Healy Lumber Co.* 686

EXAMINATION:

Of jurors, see **JURY**, 2.

EXCEPTIONS:

In deeds, see **DEEDS**, 2.

EXCESSIVE DAMAGES:

See **DAMAGES**, 3-6.

Correction of mistake by court, see **TRIAL**, 10

EXECUTION:

See GARNISHMENT.

Right of sheriff to appeal from judgment, see APPEAL AND ERROR, 4.

Against property acquired with separate and community funds, see HUSBAND AND WIFE, 4.

1. EXECUTIONS—SALE—NOTICE—OBJECTIONS—RETURN. Objection to an execution sale, on the ground that notice of the sale was not given as required by statute, cannot be made where the sheriff's return shows substantial compliance with the statute. *Ervey v. Hill* 457

EXECUTORS AND ADMINISTRATORS:

Assignment by heirs of interest not represented by administrator, see JUDGMENT, 5, 6.

1. EXECUTORS AND ADMINISTRATORS—LAND UNDER CONTRACT OF SALE—PROCEEDINGS—PARTIES—STATUTES—IMPLIED REPEAL. Bal. Code, § 6381 *et seq.*, providing that the probate court may authorize an administrator to convey lands which the decedent had contracted to convey, is not impliedly repealed by Bal. Code, § 4640 *et seq.*, providing that upon the death of a person, the lands of which he died seized shall immediately vest in the heirs; since repeals by implication are not favored, and lands held by the deceased under contract to convey may be treated as personalty; hence upon proceedings by the purchaser for specific performance against the administrator, under the statute, the heirs are not necessary parties defendant. *Griggs Land Co. v. Smith*..... 185

EXEMPTIONS:

1. EXEMPTIONS—LIABILITY OF AGENTS—STATUTES. An action to recover money paid to a spiritualistic medium, secured by fraud and false representations as to communications received from plaintiff's deceased husband directing the plaintiff to pay the money to the defendant, is not an action to recover on a liability incurred by an attorney or agent for money of his client or principal coming into his hands, within Laws 1901, p. 323, providing that no property shall be exempt from execution on such a liability. *Ervey v. Hill* 457
2. SAME—HOMESTEADS—STATUTES—IMPLIED REPEAL. Laws 1901, p. 323, amending Bal. Code, § 5284a, and providing that "no property" shall be exempt from liability incurred by an attorney or agent on account of money of his client or principal coming into his hands, has no application to homestead exemptions, as Bal. Code, § 5243a, refers only to personal property exemptions, and the repeal of a specified section does not repeal by implication other sections embracing other subject-matter. *Ervey v. Hill*..... 457

EXPERT TESTIMONY:

As to proper treatment for sick horse, see NEGLIGENCE, 3.

EXPLOSIVES:

Violation of ordinance prohibiting blasting, see MUNICIPAL CORPORATIONS, 13-15.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 6, 9-12.

FALSE REPRESENTATIONS:

Affecting validity of contract for sale of lands, see VENDOR AND PURCHASER, 2, 3.

FINDINGS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 7.

Review on appeal or writ of error, see APPEAL AND ERROR, 28-31.

Special findings by jury, see TRIAL, 11.

FIRES:

Malicious burning of property, see ARSON.

Destruction of horses in livery stable, see LIVERY STABLE KEEPERS.

Caused by operation of railroad, see RAILROADS.

FORECLOSURE:

Of mortgage, see MORTGAGES, 4, 5.

Of tax lien, see TAXATION, 4-8.

FOREIGNERS:

See ALIENS.

FORFEITURES:

For fraud in application for benefit certificate, see INSURANCE, 1-5.

Of contract by vendee, see VENDOR AND PURCHASER, 8.

Of payments under contract, see VENDOR AND PURCHASER, 8, 9.

FORGERY:

Payment of forged paper by bank, see BANKS AND BANKING.

FORMER ADJUDICATION:

See JUDGMENT, 10-17.

FRAUD:

See REFORMATION OF INSTRUMENTS.

Payment of forged paper by bank, see BANKS AND BANKING.

As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, 1, 4.

Issuance of spurious stock, see CORPORATIONS, 1, 2.

Conveyances in fraud of wife, see HUSBAND AND WIFE, 5.

In application for benefit certificate, see INSURANCE, 1-4.

In sale of partnership property, see PARTNERSHIP, 2, 3.

In payment of taxes as defense to foreclosure action, see TAXATION, 8.

Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 2, 3, 13.

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—CONTRACT IN WRITING—MEMORANDUM—SUFFICIENCY.** Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, a note of instructions to the agent containing none of the terms of the contract of employment is insufficient as a memorandum under the statute. *Keith v. Smith*..... 131
2. **SAME—PERFORMANCE—EFFECT.** Where a statute requires a contract for the employment of a broker, or a memorandum thereof, to be in writing, full performance of an oral contract will not take the same out of the operation of the statute or authorize a recovery upon a *quantum meruit*. *Keith v. Smith*..... 131

FRAUDULENT CONVEYANCES:

See CANCELLATION OF INSTRUMENTS, 4, 5.

GARNISHMENT:

1. **GARNISHMENT—PROPERTY SUBJECT—DRAFTS.** A draft is property and subject to garnishment within the meaning of the garnishment law. *Washington Brick, Lime & Mfg. Co. v. Traders' National Bank* 23
2. **SAME—OWNERSHIP OF PROPERTY—DRAFTS—BANKS AND BANKING—DEPOSITS.** Where a draft is deposited with a bank which has a rule that in receiving collections it acted only as agent and assumed no responsibility beyond due diligence, the depositor receiving credit for the amount of the draft, but if the draft was not paid the amount was charged back, the ownership of the draft remains in the depositor, although he was allowed to check against it, as that was simply an accommodation extended; and upon garnishee process against the bank in an action against the depositor, it is properly found that, pending collection, an accepted draft deposited by the defendant is property of the defendant in possession of the garnishee. *Washington Brick, Lime & Mfg. Co. v. Traders' National Bank* 23

GUARANTY:

Contracts of suretyship, see PRINCIPAL AND SURETY.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 32-34.
 In criminal prosecutions, see CRIMINAL LAW, 7.
 In trial of civil actions, see TRIAL, 3, 8.

HEARSAY:

In civil actions, see EVIDENCE, 3.

HIGHWAYS:

1. **HIGHWAYS—OVER PUBLIC LANDS—PRESCRIPTION—GRANT—ACCEPTANCE.** Adverse user by the public of a road across the public lands for a period of less than seven years does not constitute a highway by prescription or an acceptance of the Congressional grant of the right to establish highways over public lands, which is not a grant *in praesenti* without any act to establish the highway. *Vogler v. Anderson* 202
2. **HIGHWAYS—LOCATION—WIDTH OF ROAD—NOTICE.** Under Code of 1881, § 2971, providing that all county roads shall be sixty feet in width unless, on the prayer of the petitioners, the county commissioners shall determine on a less width, the commissioners have power to fix a less width upon the prayer of any of the petitioners at the hearing, without giving any new notice, as the law did not require the notice to state the width petitioned for. *Hab v. Georgetown* 642
3. **SAME.** Upon a prayer by petitioners for a county road, to fix the width at thirty feet, under Code 1881, § 2971, the county commissioners have a discretion to determine upon a width of forty feet. *Hab v. Georgetown* 642
4. **SAME—COMPENSATION—WAIVER—EMINENT DOMAIN.** A petition to the county commissioners by an abutting owner to open a forty-foot county road to the width of sixty feet, does not grant the right to take his abutting property without compensation. *Hab v. Georgetown* 642

HOMESTEAD:

Exemption of property of debtors from forced sale in general, see EXEMPTIONS.

Sale of homestead in public lands, see PUBLIC LANDS, 2.

1. **HOMESTEAD—WIDOW—SELECTION.** The widow is entitled to claim a homestead in community land purchased for that purpose and occupied as a home by the deceased at the time of his death, although not previously selected as a homestead. *In re Murphy's Estate*. 574
2. **SAME—ALLOTMENT.** Four lots in one tract may be set aside to a widow as a homestead, although there are two houses thereon, one under lease, where the whole tract was purchased for a home, was less than \$1,000 in value, and the evidence as to the value of the buildings is not clear, one appearing to be a mere shack. *In re Murphy's Estate* 574
3. **SAME—ABANDONMENT.** A widow is not deprived of her homestead rights by the fact that she was driven therefrom by her husband without cause and not permitted to return, where she never evinced any intention of abandoning the same, and the property constituted the home of the husband at the time of his death. *In re Murphy's Estate* 574

HOSPITALS:

Selection by master for benefit of employees, see **TORTS**.

HUSBAND AND WIFE:

Actions for wrongful death of husband or wife, see **DEATH**.

Divorce and judicial separation, see **DIVORCE**.

Rights of survivor in homestead, see **HOMESTEAD**.

Conclusiveness of judgment against spouse, see **JUDGMENT**, 16.

Marriage and annulment thereof, see **MARRIAGE**.

Joinder of parties in action for tort, see **PARTIES**.

1. **HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—RENTS AND PROFITS—DEBTS OF HUSBAND.** Barley raised upon the real estate purchased by a wife with her separate funds, is her separate property, where she conducted the farming of the land in her own name and in her separate interest without any assistance from her husband, who was away most of the time and largely indebted at the time of his marriage. *Hester v. Stine*..... 469
2. **SAME—ACTIONS—RIGHT OF WIFE TO SUE—REPLEVIN—COMPLAINT—SUFFICIENCY—AFFIRMATIVE DEFENSE—REPLY.** In an action of replevin by a married woman under statutes authorizing her to acquire, hold and sue for property as if she were unmarried, a complaint alleging that she was the owner and entitled to the possession of the property is sufficient without derailing her title; and an answer that she was a married woman and that the "property had been acquired since the marriage" states no affirmative defense, and requires no reply from her showing that she acquired the property as separate property. *Hester v. Stine*..... 469
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—FUNDS ACQUIRED IN ANOTHER STATE—WHAT LAW GOVERNS.** Real property in this state is the separate property of the husband, where it was purchased by him with money acquired by him in trade after marriage while domiciled with his wife in another state under laws making such money his separate property; for to hold the same community property would affect vested rights. *Brookman v. Durkee*..... 578
4. **HUSBAND AND WIFE—COMMUNITY PROPERTY—PROPERTY ACQUIRED WITH SEPARATE AND COMMUNITY FUNDS—EXECUTION—INJUNCTION.** Where a wife purchases lands, paying part of the price with her separate funds and the balance with money borrowed by her on the land, the same becomes community property in the proportion that the sum borrowed bears to the separate funds invested therein; and an execution sale for a community debt will be enjoined only to the extent of her separate interests. *Heintz v. Brown*..... 387
5. **HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY OF HUSBAND—TRUST—VENDOR AND PURCHASER—BONA FIDE PURCHASER.** Where a trustee held a school land contract belonging to a community as security for future advances to be made, the written con-

HUSBAND AND WIFE—CONTINUED.

sent of the husband, not joined in by, and concealed from, the wife, that a conveyance might be made by the trustee to a third person, is insufficient to authorize the conveyance or to make such third person a *bona fide* purchaser. *Norgren v. Jordan*..... 437

6. **HUSBAND AND WIFE—COMMUNITY PROPERTY—DEED—EFFECT OF RECITALS.** Recitals in a deed to a husband to the effect that the land was his separate property, do not affect the community character of the land where it was purchased with community funds and the wife was unaware of the recitals. *In re Murphy's Estate*..... 574

ICE:

Liability for injuries caused by ice on city street, see **MUNICIPAL CORPORATIONS**, 19, 20.

INCOMPETENT PERSONS:

See **INSANE PERSONS**.

INCUMBRANCES:

See **MORTGAGES**.

INDEMNITY:

Contracts of suretyship, see **PRINCIPAL AND SURETY**.

INDIANS:

Evidence of marriage, see **MARRIAGE**, 2.

1. **INDIANS—LANDS—ALLOTMENTS—SALE OF LANDS—STATUTES—CONSTRUCTION.** Under the act of Congress authorizing a commission to sell lands allotted to the Puyallup Indians, and held by them under restrictions against alienation, the written consent to such a sale, required to be given by an allottee, is not revoked by his death, but finally authorizes a sale without further consent of heirs; especially as the Interior Department has so construed the law, and no reason exists for departing from such construction. *Prichard v. Jacobs*. 562
2. **INDIANS — CONVEYANCES — RESTRICTION AGAINST ALIENATION — ESTOPPEL TO ASSERT INVALIDITY.** Where a lease for 99 years was made by Indian patentees while there existed a restriction against their alienation of the premises for five years from the date of a patent, the lessors and their heirs and assigns are estopped from questioning the validity of the lease, where they waited before doing so for over twenty years, during which time the lessees and their assigns occupied the premises, paid rent, and made valuable improvements relying on the validity of the lease. *McDonald v. White*.. 334

INDICTMENT AND INFORMATION:

See **LARCENY**.

INJUNCTION:

Against execution on property acquired with separate and community funds, see **HUSBAND AND WIFE**, 4.

Obstruction of navigable stream, see **NAVIGABLE WATERS**.

1. **INJUNCTIONS—PARTIES—HIGHWAYS—OBSTRUCTION.** A mortgagee of a strip of land is a proper but not a necessary party to an action to declare the same a public alley, and is properly allowed to intervene therein. *Forster v. Raznik*..... 692

INNKEEPERS:

Liability for acts of servants, see **MASTER AND SERVANT**, 13.

INSANE PERSONS:

1. **INSANE PERSONS—DANGEROUS CHARACTER—EVIDENCE OF—CONCLUSIVENESS.** Acquittal on the ground of insanity is conclusive that defendant is insane, and the fact that defendant killed a man, is conclusive that he is "manifestly dangerous," in the absence of clear evidence that his mental condition has undergone a radical change. *State ex rel. Thompson v. Snell*..... 327
2. **INSANE PERSONS—COMMITMENT—ACQUITTAL ON GROUND OF INSANITY—STATUTES—APPLICATION.** The general statute, Bal. Code, § 2660, providing for inquisitions of insanity, has no application to one acquitted of murder on the ground of insanity; since such case is covered by a special act, Bal. Code, § 6959, requiring the commitment of such person, if dangerous to be at large, which provision is mandatory; and since an insane condition once adjudicated is presumed to continue until the contrary is shown. *State ex rel. Thompson v. Snell*..... 327
3. **INSANE PERSONS—ACQUITTAL OF CRIME ON GROUND OF INSANITY—IMPRISONMENT—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRESUMPTIONS.** One accused of murder, who submits a plea of insanity to trial by jury and is found not guilty by reason of insanity, may be committed to prison if found manifestly dangerous, conformably to Bal. Code, § 6959, and is not deprived of his liberty without due process of law where he does not allege a restoration of sanity; since he was duly accorded a fair trial, and the presumption of insanity once found, continues; and since the law does not prevent a judicial investigation as to restored sanity. *State ex rel. Thompson v. Snell*..... 327
4. **SAME—IMPRISONMENT—PUBLIC POLICY.** The commitment to a jail or penitentiary of one acquitted of murder on the ground of insanity, if manifestly dangerous, is not contrary to public policy or the humane spirit of the laws dealing with the insane. *State ex rel. Thompson v. Snell*..... 327

INSANE PERSONS—CONTINUED.

5. SAME—PRISONS—WHAT CONSTITUTES. Bal. Code, § 6959, providing for the commitment to "prison" of dangerous persons acquitted of crime on the ground of insanity, authorizes commitment to a penitentiary, a county jail, or a hospital. *State ex rel. Thompson v. Snell* 327

INSTRUCTIONS:

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 16.
 As comment by court, see CRIMINAL LAW, 2, 3.
 In civil actions, see TRIAL.

INSURANCE:

1. INSURANCE—APPLICATION—MISSTATEMENT OF AGE—FORFEITURE. Where an application for fraternal insurance falsely stated that the applicant was within the age limit, when he knew that he was ineligible, his certificate of membership is void and payments made thereunder are forfeited, where the application declares the statements to be true and the basis of the contract, and expressly provides for forfeiture of payments in case of false statements or suppression of facts. *Elliott v. Knights of The Modern Maccabees*..... 320
2. SAME—KNOWLEDGE OF MISSTATEMENTS. A member in a mutual benefit society cannot avoid forfeiture of his certificate for false representations in his application that he was within the age limit, on the theory that he did not read the application, where he informed the agent that he was ineligible and consented to the agent's "putting him through" in violation of the by-laws, repeated the false statements in an application for reinstatement, and payed assessments many years under a certificate that falsely stated his age. *Elliott v. Knights of The Modern Maccabees*..... 320
3. SAME—NOTICE TO AGENT—FORFEITURE—ESTOPPEL. Notice to an agent or organizer of a mutual benefit society that an applicant was over the age limit and ineligible, under the by-laws, is not notice to the society which would prevent a forfeiture of the membership for false representations as to the age, where it appears that the agent urged the making of the false representations for the purpose of enabling him to complete the organization of a lodge, and agreed that the applicant should have no further trouble; since the same amounted to a conspiracy to defraud the principal, and the applicant had no right to assume that the notice would be communicated by the agent to the principal. *Elliott v. Knights of The Modern Maccabees* 320
4. SAME—RIGHT TO RECOVER PAYMENTS—FRAUD. Where a certificate in a mutual benefit society is void *ab initio* for false statements that the member was within the age limit, assessments paid to the so-

INSURANCE—CONTINUED.

- ciety cannot be recovered, where the contract expressly declares that they shall be forfeited. *Elliott v. Knights of The Modern Maccabees* 320
5. SAME. Recovery cannot be had of assessments paid to a mutual benefit society under a void certificate affording no protection, where the society had done business on the current cost plan, under which the assessments had been disbursed in satisfaction of claims, and the society could not be placed in *statu quo*. *Elliott v. Knights of The Modern Maccabees*..... 320
6. SAME—BY-LAWS—WAIVER—OFFICERS—AUTHORITY. By-laws of a mutual benefit society expressly prohibiting the admission of members over a certain age cannot be waived by the officers of the society. *Elliott v. Knights of The Modern Maccabees*..... 320

INTERVENERS:

See INJUNCTION.

INTOXICATING LIQUORS:

- Act providing for seizure of liquors kept contrary to law, see STATUTES, 1.
1. INTOXICATING LIQUORS — OFFENSES — LIQUORS PROHIBITED. In a prosecution for keeping a room for the sale of intoxicating liquors contrary to law, it is not error to instruct that beer is an intoxicating liquor. *State v. Moran*..... 596

IRRIGATION:

See WATERS AND WATER COURSES.

Condemnation of waters for, see EMINENT DOMAIN, 4, 10, 11.

ISSUES:

Identity of issues *res judicata*, see JUDGMENT, 12, 13, 15, 16.

JOINDER:

Of causes of action, see ACTION, 2.

Of parties plaintiff in civil actions, see PARTIES.

JOINT TENANCY:

See TENANCY IN COMMON.

JUDGMENT:

Review, see APPEAL AND ERROR.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 35.

Authority of attorney to satisfy, see ATTORNEY AND CLIENT, 2.

In action for divorce, see DIVORCE, 2, 3, 5-7.

Condemnation proceedings, see EMINENT DOMAIN, 24, 25.

JUDGMENT—CONTINUED.

1. JUDGMENTS—RECITALS—SERVICE OF PROCESS—PRESUMPTIONS. The presumption of jurisdiction from the recital in a tax foreclosure judgment of due service of summons is not overcome by defects in the record. *Bock v. Sanders*..... 462
2. JUDGMENT—REVIVAL—APPEARANCE OF DEFENDANT—PROCESS—WAIVER. The appearance of a defendant to contest the revival of a judgment, void for want of service of process, does not waive service of process in the original action; and he cannot be required to answer the complaint upon entry of a decree setting aside the judgment. *Waterman v. Bash*..... 212
3. JUDGMENT—PROCESS—TAXATION—FORECLOSURE OF TAX LIEN—FORM OF SUMMONS. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default; and Laws 1899, ch. 141, does not change the law in regard to the requirements of the summons. *Bartels v. Christensen* 478
4. JUDGMENT—ENTRY—APPEAL—HARMLESS ERROR. Failure to enter judgment against appellant immediately after the rendition of a verdict, and that it was not signed until after denial of a new trial, are mere irregularities, and harmless error when no prejudice appears. *Schultz v. Simmons Fur Co.*..... 555
5. JUDGMENTS—VACATION—DEATH OF PARTY—RIGHT TO RELIEF. Where H., having an interest in tide lands, contracted with C. to obtain the title from the state, and C. took an appeal from the decision of the board of land commissioners awarding the property to other parties, but died pending final judgment on the appeal, which judgment recited the fact of C.'s death and that his heirs at law, who also had since died, had conveyed their interests to others, to whom the decree then awarded the property, H. cannot sustain an action by her to set aside the judgment as in fraud of her right, by allegations that parties to the action were dead before entry of the judgment, and that their interests had not been represented by an executor or administrator or other legal representative; since the death of a party does not render the judgment void or subject to collateral attack, but only voidable on timely motion; and since the decree was not rendered in a strictly adversary proceeding, nor by the court of original jurisdiction, but was an appellate decree, the vacation of which would only reinstate the appeal and not necessarily benefit the plaintiff. *Hotchkin v. Bussell*..... 7
6. SAME—TRUSTS—CONVEYANCE BY TRUSTEE. In such a case, the assignment by the heirs at law of C. passed his preference right to purchase the tide lands, without the appointment of an administra-

JUDGMENT—CONTINUED.

tor, and was properly recognized by the court in entering the decree, which was conclusive of the fact that the right passed by the assignment; and the recourse of H., if C. was acting as her trustee, must be against the other parties to the proceeding, for an accounting, the decree being valid although the trusteeship continues. *Hotchkiss v. Russell*..... 7

7. JUDGMENT—VACATION—RECITALS—PRESUMPTIONS. Where a judgment recites due service of process, and the record shows jurisdiction, an application to vacate the judgment, on the grounds that the service was by publication and the court without jurisdiction, is demurrable, as the presumption of jurisdiction is not overcome by defects in the record. *Peterson v. Lara*..... 448
8. JUDGMENT—REVIVAL—COLLATERAL ATTACK. In a proceeding to revive a judgment, the jurisdiction of the court may be attacked by answer and the same is a direct attack on the judgment. *Waterman v. Bash*..... 212
9. SAME—PROCESS—SUBSTITUTED SERVICE—EVIDENCE OF DOMICILE—SUFFICIENCY. In an attack upon a judgment in an action commenced by service of process at defendant's usual place of abode, as stated in the affidavit of service, the evidence is sufficient to show want of jurisdiction from the fact that defendant was a nonresident of the state at the time of service, where it appears that he had not lived there more than a few days each year for four years, during which time he was engaged in business in China or New York, where he lived, neither he nor his wife were living in the state at the time of the service, and the house was occupied by a daughter, to whom it belonged, and a third person to whom copy of process was delivered. *Waterman v. Bash*..... 212
10. JUDGMENT—BAR—DISMISSAL AND NONSUIT—EFFECT OF STIPULATION. A dismissal of a proceeding under a stipulation dismissing the same without costs to either party, does not amount to a retraxit, and cannot be pleaded in bar of another action without alleging facts showing a full settlement of the contested points. *State Medical Examining Board v. Stewart*..... 79
11. SAME—ABATEMENT—MERITS. A dismissal of an action on the ground of the pendency of another action for the same cause, cannot be pleaded as a determination of the merits in a subsequent action. *State Medical Examining Board v. Stewart*..... 79
12. JUDGMENT—RES ADJUDICATA—IDENTITY OF PARTIES. Where, in an action for the foreclosure of a mortgage upon premises which were subject to a water right, the extent of which was in dispute between the mortgagees and the successors in interest of the grantees of the water right, the judgment of foreclosure, determining the extent of

JUDGMENT—CONTINUED.

- the water right against the claims of the grantees thereof, is not *res adjudicata* as against the original grantor of the water right and his successors, who were not parties to the foreclosure action. *Schmidt v. Olympia Light and Power Co.*..... 360
13. SAME—QUESTIONS DETERMINED. One who acquired title under foreclosure proceedings in which it was adjudged, on the only issue litigated, that the title was subject to a water right, cannot contest the title to the water right, but is conclusively bound by the decree. *Schmidt v. Olympia Light and Power Co.*..... 360
14. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—DETERMINATION—EVIDENCE. In an action between joint builders of a spur track to recover a balance due from one to the other on account of expenditures, a general verdict in favor of the plaintiff for \$2,800 cannot be shown by a computation to conclusively establish the fact that the cost of construction was \$10,943.56, so as to estop a party from claiming in a subsequent action that the cost was \$12,836.75, where there was no special finding in the previous suit, and it appears that a counterclaim was interposed for an independent matter, which the jury might have allowed under the evidence, and where in the previous action the cost of construction was shown by the written statement of one party to be \$12,836.75, and by the admission of the other party to be \$12,253.30, and was admitted in the pleadings of the subsequent action to be \$11,313.16. *Brehm Lumber Co. v. Niblock*.. 180
15. JUDGMENT—RES JUDICATA—IDENTITY OF CAUSES—ACTIONS—SPLITTING CAUSES—REMEDY FOR MISTAKE. Judgment in an action of ejectment awarding plaintiff the possession of premises along a disputed boundary line, by reason of title by adverse possession, is *res judicata* in a subsequent suit between the same parties to recover an additional strip claimed to have been omitted by mistake from the former complaint, where plaintiff was dispossessed of both tracts by one forcible trespass by the defendant and the same evidence would be required to support both actions; as the plaintiff cannot thus split up his cause of action, and any remedy for the mistake in the first complaint would be by a proceeding to open the former judgment. *Kline v. Stein*..... 546
16. JUDGMENT—RES JUDICATA—IDENTITY OF SUBJECT-MATTER AND OF PARTIES. Where two promissory notes were given in payment for two horses, and the vendee brought suit against the payee to cancel the notes, for fraudulent representations, judgment allowing the plaintiff damages for such fraud, and applying the same upon one of the notes, which was cancelled thereby, is not a bar to an action upon the other note, brought by the assignee of the payee against the vendee and his wife; but the wife, as a member of the community receiving the benefit thereof, is bound by the former judgment, which is *res judicata* as to the defense of fraud. *Parker v. Galbraith*.. 280

JUDGMENT—CONTINUED.

17. **SAME—PLEADING.** In such a case, an allegation that a different decree would have been rendered, had C. been alive or had an administrator been substituted, is an expression of opinion and not an allegation of fact. *Hotchkin v. Bussell*..... 7

JUDICIAL SALES:

- On execution, see **EXECUTION**.
Of land for nonpayment of taxes, see **TAXATION**.

JURISDICTION:

- Presumption from due service of process, see **JUDGMENT**, 1, 7.

JURY:

- Instructions invading province of jury, see **ADVERSE POSSESSION**, 1.
Selection of jury as part of record on appeal, see **APPEAL AND ERROR**, 11.
Instructions in criminal prosecutions, see **CRIMINAL LAW**, 2, 3.
In condemnation proceedings, see **EMINENT DOMAIN**, 21-25.
Instructions in civil actions, see **TRIAL**.
1. **JURY—RIGHT TO TRIAL BY—WAIVER.** Defendant waives a jury by his default and failure to demand the same, under Laws 1903, p. 50. *Oregon R. & Nav. Co. v. McCormick*..... 45
2. **JURORS—BIAS—DISCRETION OF COURT.** A juror will not be found to be disqualified by actual bias, as defined by Bal. Code, § 4983, by reason of answers to questions based on assumption of facts not supported in the record, where he had no knowledge of the case and no opinion as to the guilt or innocence of the accused and, considering his examination as a whole, the trial judge could not be said to have abused the discretion reposed in him by such statute. *State v. Gohl* 408

KNOWLEDGE:

- As element in creation of estoppel, see **ESTOPPEL**, 4.
As element of ratification by principal of agent's acts, see **PRINCIPAL AND AGENT**, 2.

LACHES:

- In proceedings for certiorari, see **CERTIORARI**, 2.
In suits to quiet title, see **QUIETING TITLE**, 3.
In suit to enforce specific performance, see **SPECIFIC PERFORMANCE**, 2.

LANDLORD AND TENANT:

- Parol evidence to vary lease, see **EVIDENCE**, 7.
Lease of Indian lands, see **INDIANS**, 2.
Joint lessees, see **TENANCY IN COMMON**.

LANDLORD AND TENANT—CONTINUED.

1. **LANDLORD AND TENANT—LEASE—ABANDONMENT.** A lease of a strip of land intended to be used for a logging road is not abandoned by failure to build the road, where the lease did not require the same, and the lessee performs all conditions of the lease. *Morris v. Healy Lumber Co.*..... 686
2. **SAME—LACK OF MUTUALITY.** A lease for one year, and “so on from year to year” until terminated by a notice to be given by the lessee, is not a lease for an indefinite term as defined by the statutes, and is not void for lack of mutuality. *Morris v. Healy Lumber Co.*..... 686
3. **LANDLORD AND TENANT—ORAL LEASE—TENANCY FROM MONTH TO MONTH—TERMINATION—NOTICE.** An oral lease for the term of one year, with monthly rent reserved, payable in advance, creates a tenancy from month to month, and may be terminated by proper notice given the requisite time before the end of any month. *Mades v. Howaldt* 450
4. **SAME—TENANCY AT WILL—INDEFINITE TERM—TERMINATION.** If there is, in this state, a tenancy at will, it can only be terminated by giving the notice required for the termination of a tenancy for an indefinite time, a tenancy at will not being otherwise recognized by the statutes. *Morris v. Healy Lumber Co.*..... 686

LANDS:

See PUBLIC LANDS.

Dedication to public use; see DEDICATION.

Indian lands, see INDIANS.

LARCENY:

1. **LARCENY — INFORMATION — OWNERSHIP — STATUTORY PROVISIONS—VARIANCE.** Under Bal. Code, § 6861, providing that, upon prosecutions for horse-stealing where the ownership is unknown, the property shall be deemed to be owned by the state of Washington, and that proof of the actual owner shall not be deemed a variance where the information alleges the state to be the owner, it is not necessary to allege that the ownership is unknown in an information charging that the horse was the property of the state of Washington. *State v. Eddy*..... 494
2. **SAME.** In such a case, the state cannot be held to have known the actual ownership because its witnesses testified that the animal bore the brand of and was owned by S., where defendant denied such fact and claimed the animal to be without brand and an “outlaw.” *State v. Eddy*..... 494

LAW OF THE CASE:

Decision on appeal, see APPEAL AND ERROR, 35.

LAWYER:

See ATTORNEY AND CLIENT.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 4.

LETTERS:

Admissibility in general, see EVIDENCE, 1.

LIBEL AND SLANDER:

1. **LIBEL—WHAT CONSTITUTES—TRUTH OF CHARGE—BURDEN OF PROOF—TRIAL—VERDICT.** Under Bal. Code, § 7087, defining libel to be the defamation of a person by words tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, a newspaper article holding up an attorney to public ridicule for refusal to pay bills for printing and for charging excessive fees is libelous, and the burden of establishing the truth is on the defendant; and where the publication is admitted and no evidence in justification is offered as to the matters libelous *per se*, the jury should be instructed to award damages therefor. *Reynolds v. Holland*..... 537
2. **LIBEL—ACTIONS—EVIDENCE—ADMISSIBILITY.** In an action by an attorney for libel in publishing that he charged an excessive fee for the foreclosure of a mortgage when the work was done by defendant's attorney, evidence on the part of the plaintiff that he was attorney of record in the foreclosure suit and had not been released by the mortgagee from responsibility, is admissible. *Reynolds v. Holland* 537
3. **SAME.** In such an action, evidence that the fee allowed in the decree was excessive, offered by the defendant to sustain the truth of the charge, is inadmissible, since the allowance was to the client and had no bearing on the issues involved. *Reynolds v. Holland*. 537

LICENSES:

Revocation of physician's license, see LIMITATION OF ACTIONS, 1.

1. **LICENSES—USE OF REAL PROPERTY—REVOCATION.** Aid and consent in extending a walk and wires across a certain lot amounts to but a license revocable at any time. *Van Siclen v. Muir*..... 38

LIENS:

Liens of mechanics and materialmen, see MECHANICS' LIENS.

For taxes paid, see TAXATION, 1-3, 5, 8.

LIMITATION OF ACTIONS:

Suit to quiet title, see QUIETING TITLE, 3.

1. **LIMITATION OF ACTIONS—PHYSICIANS AND SURGEONS—LICENSES—PROCEEDINGS TO REVOKE—RULE OF EVIDENCE.** Under Laws 1905, p. 70, providing no limitation, the statute of limitations cannot be pleaded in bar of a proceeding to revoke the license of a physician on the ground of a conviction of an offense involving moral turpitude, under Bal. Code, § 3015, making the same conclusive evidence of unprofessional conduct, as the same is but a rule of evidence to which the statute of limitations does not apply. *State Medical Examining Board v. Stewart*..... 79
2. **LIMITATION OF ACTIONS—STATUTORY BOND.** An action upon a statutory bond given to a school district to guarantee a building contract is barred where the same was not commenced within three years from the time that the debt was contracted and the statute had run against such debt. *Johnson Service Co. v. Aetna Indemnity Co.* 434
3. **LIMITATION OF ACTIONS—TRESPASS—MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE.** An action for damages to abutting property resulting from the change of a street grade is not an action for trespass, barred by the statute of limitations within three years, under Bal. Code, § 4800, subd. 1, but is an action for relief not otherwise provided for, limited to two years by Bal. Code, § 4805. *Denney v. Everett*..... 342

LIQUORS:

See INTOXICATING LIQUORS.

LIVERY STABLE KEEPERS:

1. **LIVERY STABLE KEEPERS—FIRES—CARE OF HORSES—QUESTION FOR JURY.** In an action against a livery stable keeper for the loss of horses destroyed by fire, the question whether the defendant exercised ordinary care in guarding against fires, is for the jury, where it appears that the barn was in a peculiarly exposed position, that the stalls were so located as to make it difficult to extricate horses in case of fire, that defendant had no employee whose duty it was to guard against fires, and that the only employees in the barn on the night of the fire were engaged in their duties so far from the scene of the fire as not to discover it until the alarm was given and the fire so far advanced as to make it impossible to release any of the horses in the part of the barn where plaintiff's horses were kept; since reasonable minds might differ upon the question. *Weaver v. Montana Stables*..... 65
2. **SAME—INSTRUCTIONS.** In an action against a livery stable keeper for the loss of horses destroyed by a fire, a requested instruction to the effect that the defendant would not be liable if the fire was

LIVERY STABLE KEEPERS—CONTINUED.

started by a third person is properly refused, where the same is in effect given with the qualification "unless by the exercise of ordinary care on the part of the defendant" the horses could have been saved notwithstanding the fire. *Weaver v. Montana Stables*..... 65

LOCATION:

Of highways, see **HIGHWAYS**, 2.

LUNATICS:

See **INSANE PERSONS**.

MALICE:

See **TORTS**.

MALICIOUS PROSECUTION:

1. **MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF—QUESTION FOR COURT—TRIAL—DIRECTION OF VERDICT.** In an action for malicious prosecution, where it appears from the undisputed evidence that the prosecutors acted upon the advice of the prosecuting attorney after making a full and truthful statement of all known facts relating to probable cause for the prosecution, it becomes the duty of the court to find probable cause as a matter of law, and to direct a verdict for the defendants; the burden of proving want of probable cause being on the plaintiff, although he was discharged. *Simmons v. Gardner*..... 282

MANDAMUS:

1. **MANDAMUS—REMEDY BY APPEAL—SUPERSEDEAS.** Mandamus will not be granted to secure a supersedeas on appeal from an order denying an intervenor leave to appear and defend a foreclosure action, as no further action can be taken thereon to enforce the order and there is nothing to supersede. *Hindman v. Colvin*.... 317
2. **MANDAMUS—TO OFFICERS—REMEDY AT LAW—COMPELLING ISSUANCE OF WARRANTS—DRAINS.** Mandamus is the proper remedy to secure the issuance by drainage commissioners of warrants in payment of services, although the right thereto is denied and plaintiff might proceed by ordinary action for breach of contract; since, under the Code, mandamus is but a form of civil action wherein appropriate relief may be given, and is specially authorized by Bal. Code, § 5755 to compel the performance of duty imposed by law upon public officers, and by Laws 1895, ch. 115, § 40, providing that the superior courts may by mandatory injunction compel the performance of the duties imposed by the drainage act. *State ex rel. Barto v. Board of Drainage Commissioners*..... 474

MANDAMUS—CONTINUED.**3. MANDAMUS—DEFENSES—VALIDITY OF STATUTE—COUNTY OFFICERS.**

A county auditor required to issue warrants for the payment of county funds is authorized to inquire whether a law requiring such payment is valid, and to attack the same for invalidity in mandamus proceedings brought against him to compel issuance of a warrant. *State ex rel. Egbert v. Blumberg*..... 270

MAPS:

Admissibility in evidence, see EVIDENCE, 5.

MARRIAGE:**1. MARRIAGE—ANNULMENT—PROCESS—DIVORCE—STATUTES — TITLES.**

The statute providing for summons by publication against nonresidents in actions for divorce, authorizes such summons in actions for annulment of the marriage, the legislature having invariably treated the two actions as belonging to one subject and established the same practice in both; and a legislative act treating of the same together does not embrace more than one subject; annulment being germane to a title which referred only to divorce. *Piper v. Piper*..... 371

2. MARRIAGE—EVIDENCE—SUFFICIENCY. A marriage between Indians is sufficiently proven where it appears that a marriage ceremony was performed by a duly licensed minister, and the parties lived together as husband and wife for many years, and upon the wife's death the husband erected a monument over her grave describing her as his wife. *McDonald v. White*..... 334**MARRIED WOMEN:**

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Criminal liability of master for torts of servant, see MUNICIPAL CORPORATIONS, 14.

Selection by master of hospital for payment of dues deducted from wages of employees, see TORTS.

Employment of armed force, what constitutes, see WEAPONS, 2.

1. MASTER AND SERVANT—SAFE PLACE—MINES—STATUTORY DUTY.

The statute requiring mine owners to furnish sufficient timbers to protect employees from "caving in" of the mine applies to the falling of a "nigger-head" or boulder in a coal mine. *Pachko v. Wilkeson Coal and Coke Co.*..... 422

2. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—PUTTING

DANGEROUS MACHINERY IN MOTION—WARNING. The master is liable to a servant, a hooktender, who is ordered by a sawyer, in charge of the crew and machinery, into a dangerous place between two logs, and is injured by the negligence of the sawyer in putting the machinery in motion so as to cause the two logs to roll together and

MASTER AND SERVANT—CONTINUED.

- catch the plaintiff without giving him time to escape from his dangerous position; since it was the duty of the master to keep the place safe or give warning of the operation of the machinery in time to permit the plaintiff to escape from the danger therefrom; and negligence of the sawyer in this respect is negligence of the master. *Maloney v. Stetson & Post Mill Co.*..... 645
3. SAME—ASSUMPTION OF RISKS—FAILURE OF STATUTORY DUTY—MINES. The defense of assumption of risk by a coal miner of the danger in working with an insufficient number of timbers cannot be raised where the master has violated a statutory duty to furnish sufficient timbers. *Pachko v. Wilkeson Coal and Coke Co.*..... 422
4. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISKS. An offbearer in a sawmill cannot recover for injuries sustained in a fall by reason of the constant accumulation of sawdust, bark and refuse upon the floor where he was required to walk, where he was in a position to observe the gradual change and made no complaint to the foreman, who was not shown to have personal knowledge thereof. *Boyle v. Anderson & Middleton Lumber Co.* 431
5. MASTER AND SERVANT—INJURIES—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK. An employee, injured by contact with a set screw upon a revolving shaft, while attempting to throw a rope over a beam for the purpose of removing the shaft, is guilty of contributory negligence precluding a recovery, where he placed his ladder against the west side of a post and climbed up and leaned forward in proximity to the collar on the revolving shaft in order to throw the rope over the beam, when he might have placed the ladder and climbed up on the east side of the post and put the rope over without coming near the shaft; inasmuch as it was contributory negligence for him to voluntarily adopt an unsafe method of doing the work where there was evident a safe way. *Bundy v. Union Iron Works* 231
6. SAME—FACTORY ACT—DEFENSE OF CONTRIBUTORY NEGLIGENCE. The defense of contributory negligence in the adoption by a servant of an unsafe method of work, when he might have adopted a safe way, is not precluded by the factory act requiring the guarding of dangerous machinery. *Bundy v. Union Iron Works*..... 231
7. MASTER AND SERVANT—INJURY TO SERVANT—COMPLAINT—GENERAL ALLEGATION OF NEGLIGENCE. A complaint in an action by a servant for negligence is good as against demurrer, where it alleges in general terms the failure of the master with respect to the performance of various specified duties, although it does not set out any detail concerning the acts complained of. *Niemciek v. McCormick Lumber Co.*..... 496

MASTER AND SERVANT—CONTINUED.

8. SAME—INJURY TO SERVANT—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the death of a miner was caused by the fall of nigger-heads in a coal mine, where a witness nearby heard the fall, and there were nigger-heads in the face of the coal and walls where deceased was working, and two or three of these were found near decedent's body immediately after his death. *Pachko v. Wilkeson Coal and Coke Co.*..... 422
9. MASTER AND SERVANT—INJURIES—GUARDING DANGEROUS MACHINERY—FACTORY ACT—EVIDENCE—QUESTION FOR JURY. Whether gearing for rollers bearing off lumber from a saw were sufficiently guarded under the factory act is properly for the jury, where, from some of the defendant's own testimony, it appeared that while the guard, which covered only the upper half of the gearing, was in common use, it was not primarily a safety guard but rather one against the accumulation of waste clogging the gears, and that it was no protection against the lower portion of the gearing, a few inches from the floor, along which the plaintiff was compelled to work. *Noren v. Larson Lumber Co.*..... 241
10. SAME—GUARDING DANGEROUS MACHINERY—FACTORY ACT—QUESTION FOR JURY. A nonsuit is error in an action by an offbearer who slipped and fell, throwing his hand into gearing for the live rolls which bear away lumber from a saw, and which were guarded only on top, and unprotected on the lower side about eight inches from the floor, along which gearing the plaintiff was required to walk; since it was a question for the jury whether the gearing could have been, or was, effectively guarded, or whether the accident should have been reasonably anticipated. *Boyle v. Anderson & Middleton Lumber Co.*..... 431
11. SAME—ASSUMPTION OF RISK—INSTRUCTIONS. In an action by an employee for injuries sustained through the master's failure to comply with the factory act requiring the guarding of machinery, instructions to the effect that the employee assumed the risks, if the same were equally as evident to the servant as to the master and the master had made a *bona fide* attempt to comply with the factory act, are properly refused. *Noren v. Larson Lumber Co.*..... 241
12. SAME. In such an action, an instruction that failure to provide a guard that would have prevented the injury is not of itself proof of failure to comply with the law, if the master had guarded against accidents that could reasonably be anticipated, is as favorable to the defendant as can be asked. *Noren v. Larson Lumber Co.*..... 241
13. MASTER AND SERVANT—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—INNKEEPERS—PATRONS—PROTECTION AND EJECTION. Waiters, in ejecting a negro from a restaurant for an alleged insult to a lady patron, are acting within the scope of their employment if the

MASTER AND SERVANT—CONTINUED.

same was done for the purpose of according protection to such patron, and the owner of the restaurant is liable for damages occasioned by unnecessary force and violence; but if the waiters were actuated by jealousy, hatred, or ill-feeling independent of their duty toward the lady patron, they acted outside of their employment, and their master was not liable for their acts. *Chase v. Knabel*..... 484

MEANDERED WATERS:

See BOUNDARIES, 1.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—DELIVERY OR USE OF MATERIALS—EVIDENCE.** A judgment foreclosing a mechanics' lien must be reversed, where there was no testimony tending to show that the materials were delivered or furnished for use in the building or that they were so used. *Crane Co. v. Farnandis*..... 436

MEETINGS:

Of municipal council, see MUNICIPAL CORPORATIONS, 1, 21.

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF.

MENTAL SUFFERING:

As element of damages, see DAMAGES, 1.

MINES AND MINERALS:

Right to acquire, see ALIENS, 1.

Injuries to employees from employer's violation of statute, see MASTER AND SERVANT, 1, 3, 8.

MISCONDUCT:

Of counsel, see TRIAL, 3.

Of jurors, see TRIAL, 7, 8.

MISREPRESENTATION:

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 2, 3.

MISTAKE:

Basis of claim for adverse possession, see ADVERSE POSSESSION, 3.

Name of defendant in verdict, see CRIMINAL LAW, 5.

Description in deed, see DEEDS, 2.

Recovery of land omitted in former action, see JUDGMENT, 15.

Correction of verdict by court, see TRIAL, 10.

MITIGATION:

Evidence to mitigate damages, see VENDOR AND PURCHASER, 13.

MODIFICATION:

Of decree, see **DIVORCE**, 5-7.

MONTH:

Tenancy from month to month, see **LANDLORD AND TENANT**, 3.

MORTGAGES:

1. **MORTGAGES — ABSOLUTE DEED AS MORTGAGE — EVIDENCE — SUFFICIENCY.** An absolute deed is not shown, by clear and satisfactory evidence, to be a mortgage, where only the grantor testified to that effect and he was contradicted by three witnesses, part of whom were disinterested, and where the grantor took the precaution to reserve a gravel bed embracing but a small proportion of the land, which would probably not have been excepted had the transaction been a loan. *Sahlin v. Gregson*..... 452
2. **SAME—INADEQUACY OF PRICE.** In an action to reform a deed of a one-half interest in land, claimed by plaintiff to be a mortgage to secure \$100, inadequacy of such sum as a purchase price is not shown, where it appears that the whole property was subject to a mortgage for \$1,500, which was at least two-thirds of its value; that previously, but subsequent to the mortgage, the grantor had conveyed a one-half interest in the property by warranty deed, which might throw the whole burden of the mortgage on the half interest in question; and where, after the giving of the deed in question, the other half interest was sold for \$300, there having meantime been an increase in values. *Sahlin v. Gregson*..... 452
3. **MORTGAGES—DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.** An absolute deed, executed by one of two joint makers of promissory notes, in consideration of a written release from all liability on the notes and the surrender of an individual note against him, is not shown to have been intended as a mortgage by the grantor, who claimed to be only a surety on the notes, where there is no evidence that he signed the notes as surety, and where the evidence shows that the lands were held by the grantee in trust for the other maker of the note, who assumed all liability thereon, and went into possession of the property, paid the taxes thereon, and redeemed the property by payment of the notes. *Osborne v. Osborne*..... 294
4. **MORTGAGES—FORECLOSURE—EXECUTION—PLACE OF SALE—PROPERTY IN DIFFERENT COUNTIES.** Real property can be sold under execution in a foreclosure case only in the county in which it is situated and by the sheriff of that county, under Const. art. 4, § 6, providing that process of the superior courts shall extend to all parts of the state, Bal. Code, § 5890, providing that decrees of foreclosure shall be enforced by execution, and Bal. Code, § 5195, and Hill's Code, §§ 500 and 507, providing that the writ shall issue to the sheriff of the county in which the property is situated, and for notice and sale in such county; and an execution sale in one county, of lands situated in two counties foreclosed in one action, is void. *Vietzen v. Otis*. 402

MORTGAGES—CONTINUED.

5. **SAME—EFFECT OF DECREE AND CONFIRMATION.** A mortgage foreclosure sale of land situated in a county other than the one in which the sale was had is not cured by a direction in the decree that the sale be so made, or by confirmation of the sale. *Vietzen v. Otis*.. 402

MOTIONS:

- For retaxation of costs, see **COSTS**, 2.
 For direction of verdict, see **TRIAL**, 4.

MUNICIPAL CORPORATIONS:

- Inadequate and excessive damages for personal injuries, see **DAMAGES**, 4.
 Condemnation of municipal easement, see **EMINENT DOMAIN**, 9.
 Limitation of action for damage from change of grade, see **LIMITATION OF ACTIONS**, 3.
 Resignation of officials, see **OFFICERS**.
1. **MUNICIPAL CORPORATIONS—ORDINANCE—PASSAGE—MEETINGS OF CITY COUNCIL.** An ordinance is not void on the ground that it was passed at the meeting at which it was introduced, contrary to a clause in a city charter, which further provided that the council shall meet on the first Monday of each month and shall not adjourn to any other place than its regular place of meeting, where it appears that the ordinance was introduced at a meeting of the city council on January 22, and passed at a meeting held on January 29, that the council had held a meeting on Monday evening of each week since the adoption of the charter, adjourning at each session until the next Monday evening, at which the regular order of business was followed, and where the council had a right to call special meetings, and adjourned *sine die* only on the last meeting of each two-year term; since its practice relating to adjournments was in effect the calling of special meetings, which were treated as regular meetings, under the liberal construction of the provisions required by statute. *State ex rel. Atkinson v. Ross*..... 28
 2. **MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—OBJECTIONS—WAIVER—JURISDICTION—AMOUNT—SEWERS.** An objection to an assessment for the construction of a sewer in that the petition of property owners therefor was confined to a main sewer, while the assessment was extended to include, also, the costs of lateral sewers thereafter recommended by the board of public works and authorized by the city council, must be made before the city council and cannot be first raised in an action to foreclose the assessment; inasmuch as jurisdiction to levy an assessment was conferred by the petition, and the objection reaches only the amount of the assessment; especially where the improvement was authorized by a two-thirds vote of the city council, and under the charter a petition by property owners was not essential to jurisdiction in such a case. *Spokane v. Preston*. 98

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3. SAME. An objection to a local assessment that property benefited was omitted from the assessment reaches only the amount assessed against other property, and must be first raised before the city council. *Spokane v. Preston*..... 98
4. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—DETERMINATION—REVIEW. A determination by a city council that abutting property is benefited by a local improvement is a legislative question, not subject to review by the courts, in the absence of fraud or arbitrary action. *Northern Pac. R. Co. v. Seattle*..... 674
5. SAME—PROPERTY BENEFITED—RAILROAD RIGHT OF WAY. The right of way of a railroad company abutting upon a local improvement may be assessed for benefits under a statute authorizing the assessment of abutting property in proportion to its frontage on the street improved. *Northern Pac. R. Co. v. Seattle*..... 674
6. SAME—METHOD OF ASSESSMENT—FRONTAGE. Assessments for local improvements in proportion to the frontage of the abutting property are valid. *Northern Pac. R. Co. v. Seattle*..... 674
7. SAME—RIGHT TO ASSESS—VALIDITY OF LIEN. The right to levy a special assessment against a railroad right of way for local improvements is not dependent upon the question of whether a valid lien can be created against the property. *Northern Pac. R. Co. v. Seattle* 674
8. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—BENEFITS—EVIDENCE—SUFFICIENCY—REVIEW. An apportionment by commissioners appointed to assess the benefits to property from a street improvement should not be disturbed because of a variety of opinions held by witnesses, where the evidence in favor of the objections does not overbalance the evidence in support of the return. *In re Seattle*. 63
9. SAME—BENEFITS—VALUES. Commissioners appointed by the court to assess benefits may take into consideration the view from the property, if that enhances its value. *In re Seattle*..... 63
10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENT. A reassessment for a local improvement cannot be made, under Bal. Code, § 1139, unless the original assessment is in fact invalid. *Spokane v. Security Savings Society*..... 150
11. SAME—VALIDITY OF ASSESSMENT—PROPERTY LIABLE. The omission of state lands from assessment for a local improvement does not render the assessment void, where no express statutory authority existed for the assessment of state lands. *Spokane v. Security Savings Society*..... 150
12. SAME—APPORTIONMENT TO CITY. Under a charter requiring all land, liable by law to contribute to the improvement, to be assessed therefor according to benefits, the city cannot be charged with the proportion falling to state lands in the district, where there is no

MUNICIPAL CORPORATIONS—CONTINUED.

- authority to assess state lands, and the apportionment of such portion to other property in the district is not unequal or invalid, where it does not appear that any such property was assessed in excess of benefits received. *Spokane v. Security Savings Society*..... 150
13. MUNICIPAL CORPORATIONS—POLICE POWER—ORDINANCES—BLASTING. An ordinance prohibiting "blasting" applies to shots so arranged as to make a chamber at the bottom of the drilled hole, technically called a "spring" shot as distinguished from a stronger charge called a "blast," where it appears that the former hurls pieces of rock a great distance and produces the commonly understood effect of blasting. *Spokane v. Patterson*..... 93
14. SAME—MASTER AND SERVANT—TORTS OF SERVANT—CRIMINAL RESPONSIBILITY OF MASTER. An employee is guilty of violating an ordinance prohibiting blasting unless the same is properly covered, although the act was done by his servant contrary to his orders and when he was not present, where the general work of blasting was being done by his authority; since the same is a police regulation in which the element of intent is unessential. *Spokane v. Patterson* 93
15. SAME—PARTNERSHIP—CRIMINAL RESPONSIBILITY OF PARTNERS. It is immaterial that one found guilty of the violation of an ordinance prohibiting blasting was a member of a partnership carrying on the work, or that others with him jointly committed the offense. *Spokane v. Patterson*..... 93
16. MUNICIPAL CORPORATIONS—STREETS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—QUESTIONS FOR JURY. In an action for injuries sustained by a pedestrian in a collision with an automobile at a street crossing in the business center of a city, the questions of negligence and contributory negligence are for the jury, where the evidence is conflicting as to the speed of the automobile, whether it could have been stopped in time, and as to the distance from the sidewalk to the place of the accident. *Lampe v. Jacobsen*..... 533
17. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTION—ADVERSE POSSESSION—ESTOPPEL. An abutting owner is estopped to claim that a strip of land fourteen and one-half feet wide, between two platted additions to a city, is a public alley, or to maintain an action to enjoin its obstruction, where he and his predecessors had stood by for over twenty years while another was in the adverse possession under color of title and claim of right, and while such other improved the property and erected a permanent building thereon, and the city had disclaimed any right to the strip as an alley and levied taxes and assessments against the same. *Forster v. Raznik*..... 692
18. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is no evidence of contributory negligence on the part of a pedestrian who fell into an unguarded hole made by the removal of planks in a sidewalk, where

MUNICIPAL CORPORATIONS—CONTINUED.

there was nothing to contradict her testimony that she was unaware of the condition, the night was dark, and there was no light or guard except a little lumber piled up around the hole, the effect of which would be to cause one to stumble and fall into the hole. *Ashley v. Aberdeen* 385

19. **MUNICIPAL CORPORATIONS—NEGLIGENCE — DEFECTIVE SIDEWALK — QUESTION FOR JURY.** In an action against a city to recover for a fall upon a sidewalk, evidence of the plaintiff that she was on the sidewalk when she fell is sufficient to make a question for the jury as to such fact. *Bull v. Spokane*..... 237
20. **SAME—EVIDENCE OF NEGLIGENCE—SUFFICIENCY.** In an action to recover for a fall upon an icy sidewalk, there is sufficient evidence of negligence upon the part of the city, where it appears that the snow and ice had been piled up for four weeks on the sidewalk, which was very slippery, and that people had to take the middle of the road to avoid falling, nothing having been done to remove the snow and ice for about four weeks. *Bull v. Spokane*..... 237
21. **SAME—BONDS—ISSUANCE—SUBMISSION TO VOTERS—NOTICE.** Charter provisions with respect to the passage of an ordinance providing for the submission to the electors of a proposition to issue bonds are not mandatory when not of the essence of the thing to be done; and where the essential step in the proceedings—notice of the election—is duly taken and the rights of taxpayers are not prejudiced, bonds authorized by the election will not be invalidated by regarding adjourned meetings of the council as a continued meeting when the same were not so intended. *State ex rel. Atkinson v. Ross*..... 28

MUTUALITY:

Necessity for mutuality of obligation, see **CONTRACTS**, 1.
Conditions of lease, see **LANDLORD AND TENANT**, 2.

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS—RIPARIAN RIGHTS—LANDS UNDER WATERS.** A littoral owner upon a navigable lake having the preference right to purchase the abutting shore lands is entitled to a mandatory injunction against the use of the shore lands by another for access to a house boat moored in front of the land. *Van Siclen v. Muir*... 38
2. **SAME—OBSTRUCTION—NUISANCES—ABATEMENT.** A littoral owner upon a navigable lake is not entitled to the removal of a house boat moored in front of his property, as an obstruction in navigable water affecting his littoral rights or as a trespass constituting a nuisance; since only the state can object thereto or bring action to abate such a nuisance. *Van Siclen v. Muir*..... 38

NECESSITY:

For condemnation of property for public use, see **EMINENT DOMAIN**, 8.

NEGLIGENCE:

Of employers, see **MASTER AND SERVANT**.

Contributory negligence of servant, see **MASTER AND SERVANT**, 5, 6.

Causing injuries to persons using streets, see **MUNICIPAL CORPORATIONS**, 16, 18-20.

Fire caused by operation of railroad, see **RAILROADS**.

In operation of street railroads, see **STREET RAILROADS**.

Of person injured by street-car, see **STREET RAILROADS**, 4.

1. **NEGLIGENCE—PLEADING—COMPLAINT—MAKING MORE SPECIFIC.** In an action for negligently causing the death of a horse, a motion to make the complaint more definite and certain is properly overruled where the acts of negligence are set forth with more than common particularity. *Welch v. Franstoll*..... 530
2. **SAME—EVIDENCE—RELEVANCY—SIMILAR CONDITIONS.** In an action for negligently overdriving a horse, it is not error to exclude a question by defendant as to whether a witness had not driven the distance in less time with one horse, where the horse in question was one of a heavy coach team drawing a heavy buggy with four passengers, and where defendant was not deprived of showing the time in which the same could be safely driven with similar rigs. *Welch v. Franstoll*..... 530
3. **SAME—CAUSE OF INJURY TO HORSE—EXPERT EVIDENCE—CARE REQUIRED—APPEAL—HARMLESS ERROR.** In an action for negligently overdriving and causing the death of a horse, evidence of veterinary surgeons as to the proper treatment for a sick horse is not prejudicial error where it was introduced for the purpose of showing the condition of the horse and the cause of its death; especially where, in order that the jury be not misled, they were instructed that the defendant need not have the knowledge or experience of an expert horseman or veterinary surgeon, but only that of an ordinarily careful man. *Welch v. Franstoll*..... 530
4. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.** In this state, the burden of proving the contributory negligence of the plaintiff is upon the defendant. *Norman v. Bellingham*..... 205

NEWSPAPERS:

Libel, see **LIBEL AND SLANDER**.

NEW TRIAL:

Appealability of order on, see **APPEAL AND ERROR**, 2.

Questions considered on appeal, see **APPEAL AND ERROR**, 13.

Review of rulings on motion as involving discretion of court, see **APPEAL AND ERROR**, 18-20.

After remand by appellate court, see **APPEAL AND ERROR**, 36.

For excessive verdict, see **DAMAGES**, 6.

For misconduct of counsel or jury, see **TRIAL**, 3, 8.

NEW TRIAL—CONTINUED.

1. **NEW TRIAL—GROUNDS—EXCESSIVE VERDICT.** It is not an abuse of discretion to grant a new trial where the jury rendered a manifestly excessive verdict, although an offer was made to remit a portion of the sum. *Prosch v. Seattle*..... 553

NOMINAL DAMAGES:

See DAMAGES, 2.

NONSUIT:

In action by receiver to collect assets, see CORPORATIONS, 1.
On trial, see TRIAL, 5.

NONSUPPORT:

Findings justifying decree of divorce, see APPEAL AND ERROR, 28.
As ground for divorce, see DIVORCE, 1.

NOTICE:

Service of on appeal, see APPEAL AND ERROR, 8.
Notice to attorney as notice to client, see ATTORNEY AND CLIENT, 1.
Condemnation proceedings, see EMINENT DOMAIN, 17.
Of execution sale, see EXECUTION.
Proceedings to give effect to forfeiture of benefit certificates, see INSURANCE, 3.
To tenant to terminate tenancy at will, see LANDLORD AND TENANT, 4.
Termination of tenancy from month to month, see LANDLORD AND TENANT, 3.
Termination of tenancy, for years, see LANDLORD AND TENANT, 2.
Election on issuance of bonds, see MUNICIPAL CORPORATIONS, 21.
Of agent imputed to principal, see PRINCIPAL AND AGENT, 2.
Meeting of board to review assessment of taxes, see TAXATION, 4.
Affecting bona fides of purchaser of land, see VENDOR AND PURCHASER, 4-7.

NOVATION:

Assumption of firm debts by partner, see PARTNERSHIP, 4.

NUISANCE:

Obstructions in navigable stream, see NAVIGABLE WATERS.

OBJECTIONS:

To execution sale, see EXECUTION.
To local assessment, see MUNICIPAL CORPORATIONS, 2, 3.
To pleadings and waiver thereof, see PLEADING, 2.
To evidence at trial, see TRIAL, 2.

OBSTRUCTIONS:

Of streets, see MUNICIPAL CORPORATIONS, 17.

Of navigation, see NAVIGABLE WATERS.

Of water course, see WATERS AND WATER COURSES, 2.

OFFICERS:

Right of sheriff to appeal from judgment, see APPEAL AND ERROR, 4.

Right to office, review, see CERTIORARI, 1.

Corporate officers, see CORPORATIONS.

Appointment of county officers, see COUNTIES, 2.

Authority to waive by-laws of insurance society, see INSURANCE, 6.

Mandamus to compel payment of warrants, see MANDAMUS, 2, 3.

1. OFFICERS—VACANCY—RESIGNATION—NECESSITY OF ACCEPTANCE. An acceptance of the resignation of a city councilman is necessary in order to create a vacancy, under the common law rule, which is not abrogated by Bal. Code, § 1548, providing that every office shall become vacant on the resignation of an officer before expiration of his term, since nothing is said as to the method of effecting a resignation. *State ex rel. Royse v. Superior Court*..... 616

OPINIONS:

Representation as to matters of opinion as affecting contract for sale of lands, see VENDOR AND PURCHASER, 2, 3.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORAL EVIDENCE:

See EVIDENCE, 6, 7.

ORDER OF PROOF:

In criminal prosecutions, see CRIMINAL LAW, 1.

In civil actions, see TRIAL, 1.

ORDERS:

Review of appealable orders, see APPEAL AND ERROR.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1, 13-15.

OREGON DONATION ACT:

See PUBLIC LANDS.

OWNERSHIP:

Of draft deposited in bank, see GARNISHMENT, 2.

Of stolen property, see LARCENY.

By state of shore lands, see PUBLIC LANDS, 1.

PARENT AND CHILD:

Custody of children on divorce, see DIVORCE, 5-7.

PAROL AGREEMENTS:

As constituting easement by prescription, see EASEMENTS, 1, 3.

Termination of oral lease, see LANDLORD AND TENANT, 3.

PAROL EVIDENCE:

See EVIDENCE, 6, 7.

PARTIES:

Transfer of interest as ground for abatement, see ABATEMENT AND REVIVAL.

Joinder of actions against different parties, see ACTION, 2.

Persons entitled to appeal, see APPEAL AND ERROR, 4.

In action against administrator for specific performance of contract, see EXECUTORS AND ADMINISTRATORS.

In actions relating to community property, see HUSBAND AND WIFE, 2.

Suit for injunction, see INJUNCTION.

Persons concluded by judgment, see JUDGMENT, 12, 13, 16.

1. PARTIES—PLAINTIFFS—HUSBAND AND WIFE—TORTS. An action by a husband and wife for failure to properly bury the dead body of their child is not subject to the objection that there is a defect of parties plaintiff. *Wright v. Beardsley*..... 16

PARTNERSHIP:

See TENANCY IN COMMON.

Criminal responsibility of partners for violation of city ordinance, see MUNICIPAL CORPORATIONS, 15.

Appointment of receiver, see RECEIVERS.

1. PARTNERSHIP—CONTRACTS—SHARE IN PROFITS. A partnership relation is not necessarily established by a contract employing one to conduct its plumbing and tinning business for the compensation of four dollars a day and one-half of the net profits. *Belch v. Big Store Co.*..... 1
2. PARTNERSHIP — ACTIONS BETWEEN PARTNERS — FRAUD — SALES OF PARTNERSHIP PROPERTY. In an action between partners for damages for fraud in the sale of partnership property, defendant is liable where, after giving an option on the property and learning from the purchaser that the sale would be consummated, he concealed and misrepresented the amount of the consideration, and stated to the plaintiff that the sale had probably fallen through, and bought out the plaintiff's interests for a much less sum in the name of a friend, on representations that he wished to put more money in the business, which plaintiff was unable to do, agreeing to pay \$500 additional if the sale should be made; although after the sale the plaintiff received the \$500, without knowledge of the true consideration; since the utmost good faith must be observed between partners. *Finn v. Young*..... 74

PARTNERSHIP—CONTINUED.

3. **SAME—EVIDENCE OF DAMAGES.** In an action between partners for fraud in the concealment of the consideration received in the sale of partnership property, evidence that the property sold for \$35,000, and that the credits due were equal to the debts, is sufficient to show the plaintiff's damages in parting from his interest for a less sum. *Finn v. Young*..... 74
4. **PARTNERSHIP—RELEASE OF RETIRING PARTNER—NOVATION.** A novation is effected where, in consideration of part payment by a retiring partner and the promise of the continuing partner to pay the balance of the debt, the creditor agrees to release the retiring partner. *Frye & Bruhn v. Phillips*..... 190

PAYMENT:

- Of taxes, see **ADVERSE POSSESSION**, 2, 3.
- Checks, see **BANKS AND BANKING**.
- Under contract assigned for advances, see **CANCELLATION OF INSTRUMENTS**, 6, 7.
- As grounds for estoppel, see **ESTOPPEL**, 5.
- Taxes, see **TAXATION**, 1-3, 5, 8.

PERFORMANCE:

- Affecting operation of statute of frauds, see **FRAUDS, STATUTE OF**, 2.
- Of contract, see **SPECIFIC PERFORMANCE**.

PERSONAL INJURIES:

- See **ASSAULT AND BATTERY**.
- Inadequate and excessive damages, see **DAMAGES**, 3-5.
- To employee, see **MASTER AND SERVANT**.
- Caused by defects or obstructions in streets or other public places, see **MUNICIPAL CORPORATIONS**, 16, 18-20.
- To persons on cars or on or near street railroad tracks, see **STREET RAILROADS**.

PERSONS:

- Civil rights, see **CONSTITUTIONAL LAW**, 2.

PETITIONS:

- For establishment of highways, see **HIGHWAYS**, 2-4.

PHYSICIANS AND SURGEONS:

- Misjoinder of causes in criminal action, see **ACTION**, 2.
- Proceedings to revoke license, see **LIMITATIONS OF ACTIONS**, 1.

PLEADING:

- Form of action, abolishment of distinctions, see **ACTION**, 1.
- Joinder of causes of action, see **ACTION**, 2.
- Scope of review on appeal from order refusing to strike complaint, see **APPEAL AND ERROR**, 14.

PLEADING—CONTINUED.

Appealability of order on motion relating to pleadings, see **APPEAL AND ERROR**, 1.

Appealability of order on demurrer, see **APPEAL AND ERROR**, 3.

Presumption as to amendment, see **APPEAL AND ERROR**, 17, 31, 32.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 32.

In suits for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 1-3, 7.

As surprise justifying continuance, see **CONTINUANCE**, 2.

In action on corporate note, see **CORPORATIONS**, 3, 6.

For damages in general, see **DAMAGES**, 1.

By or against husband or wife, see **HUSBAND AND WIFE**, 2.

In action on judgment, see **JUDGMENT**, 17.

For injuries to servant, see **MASTER AND SERVANT**, 7.

In action for negligence, see **NEGLIGENCE**, 1.

In suits to quiet title, see **QUIETING TITLE**, 2.

In action to foreclose tax, see **TAXATION**, 8.

1. **PLEADING—REPLY—DEPARTURE.** In an action upon a contract, where the defendant alleged failure to perform within the time limit, it is not a departure to set up in the reply a modification of the original contract as to the time limit and delay occasioned by the defendant preventing a performance within such time, which was thereby waived. *Erickson v. McLellan & Co.*..... 661
2. **SAME—DEFECTS—OBJECTIONS.** Objections to defects in pleadings cannot be raised by objection to any evidence at the trial. *Erickson v. McLellan & Co.*..... 661

POLICE POWER:

Of municipality, see **MUNICIPAL CORPORATIONS**, 13-15.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

To support suit to quiet title, see **QUIETING TITLE**, 1, 2.

POWERS:

Of executors under will to sell land of decedents, see **EXECUTORS AND ADMINISTRATORS**.

Of territory to hold land for capitol site, see **TERRITORIES**.

PRACTICE:

See **ABATEMENT AND REVIVAL**; **APPEAL AND ERROR**; **CERTIORARI**; **CONTINUANCE**; **COSTS**; **DIVORCE**; **INJUNCTION**; **JUDGMENT**; **JURY**; **MANDAMUS**; **NEW TRIAL**; **PLEADING**; **TRIAL**.

Condemnation proceedings, see **EMINENT DOMAIN**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 32-34.

PRESCRIPTION:

Acquisition of rights, see **EASEMENTS**.

Establishment of highways, see **HIGHWAYS**, 1.

PRESENTMENT:

Of claim against county, see **COUNTIES**, 1.

PRESUMPTIONS:

On appeal, see **APPEAL AND ERROR**, 18.

As to jurisdiction, see **JUDGMENT**, 1, 7.

PRINCIPAL AND AGENT:

Notice to attorney, see **ATTORNEY AND CLIENT**, 1.

Personal liability of agent, see **BROKERS**, 4.

Liability for wrongful issuance of stock by agent, see **CORPORATIONS**, 1, 2.

Representation of corporation by agent, see **CORPORATIONS**, 6.

Master's liability for wrongful acts or commissions of servant, see **MASTER AND SERVANT**, 13.

1. **PRINCIPAL AND AGENT—PROOF OF AGENCY—QUESTION FOR JURY.** Where the principal's acts and admissions tend to show that one M. was acting as agent in purchasing a claim, and M. testified that, in making a compromise, he yielded to that claim, although he acted on his own behalf, the question of his agency is for the jury. *Heinzerling v. Agen*..... 390
2. **PRINCIPAL AND AGENT—AUTHORITY—RATIFICATION—NOTICE TO PUT ON INQUIRY—INSTRUCTIONS.** Upon an issue as to whether a principal ratified the unauthorized act of his agent in agreeing to give another one-half of what might be collected upon a claim purchased from such third person, it is error to instruct that the jury might find such ratification if the principal had sufficient knowledge of the transaction to put him on inquiry; and such error is prejudicial where there was conflict as to whether the principal had actual knowledge, and it cannot be said that no other verdict would have been rendered. *Heinzerling v. Agen*..... 390

PRINCIPAL AND SURETY:

1. **PRINCIPAL AND SURETY—RELEASE OF SURETY—BUILDING CONTRACTS—CHANGE OF PARTIES.** A surety company guaranteeing the faithful performance of a building contract by a copartnership is released from liability, where the owner, without the consent of the surety company, released one of the members of the copartnership and consented to his assignment of his interest to a copartner. *Friendly v. National Surety Co.*..... 71

PRIOR RIGHTS:

In condemnation proceedings, see EMINENT DOMAIN, 4, 11, 15.

PRISONS:

Confinement of criminal acquitted because of insanity, see INSANE PERSONS, 5.

PROBABLE CAUSE:

For prosecution, see MALICIOUS PROSECUTION, 3-6.

PROCESS:

Condemnation proceeding, see EMINENT DOMAIN, 17.

To sustain personal judgment, see JUDGMENT, 1-3, 7, 9.

Defects as grounds for collateral attack on judgment, see JUDGMENT, 9.

Service upon nonresident in action for annulment of marriage, see MARRIAGE, 1.

PROHIBITION:

1. PROHIBITION—GROUNDS—CORRECTION OF ERROR—REMEDY BY APPEAL.
Prohibition will not be granted to restrain further proceedings in a foreclosure proceeding, pending an appeal from an order denying leave to an intervener to appear and defend, where the court is not proceeding without or in excess of jurisdiction; as the error, if any, can be corrected on appeal. *Hindman v. Colvin*..... 317

PROPERTY:

Dedication to public use, see DEDICATION.

Taking for public use, see EMINENT DOMAIN.

Exempt from forced sale, see EXEMPTIONS.

What property subject to garnishment, see GARNISHMENT.

Licenses in respect to real property, see LICENSES.

Nature of property liable to assessment for public improvements, see MUNICIPAL CORPORATIONS, 5, 11.

PUBLIC IMPROVEMENTS:

By cities, see MUNICIPAL CORPORATIONS.

PUBLIC LANDS:

Navigable waters as boundaries to public lands, see BOUNDARIES, 1.

Right of way over public lands, see HIGHWAYS, 1.

Indian lands, see INDIANS.

Assignment by heirs of interest not represented by administrator, see JUDGMENT, 5, 6.

Lands under water, see NAVIGABLE WATERS.

Grant to territory for capitol site, see TERRITORIES, 2.

PUBLIC LANDS—CONTINUED.

1. PUBLIC LANDS—LANDS UNDER WATERS—OWNERSHIP. The shore lands on Lake Washington belong to the state, under the act of Congress admitting the state, which so declared as to the shores and beds of all navigable rivers and lakes up to and including the line of ordinary high water, and under Laws 1897, p. 730, § 4, declaring shore lands to be "lands bordering on navigable lakes and rivers below the line of ordinary high water and not subject to tidal overflow"; it appearing that the shores of Lake Washington are covered and uncovered by the rise and fall of the waters of the lake. *Van Siclen v. Muir*..... 38
2. PUBLIC LANDS—DONATION ACT—TRANSFER BEFORE PATENT. Under 10 U. S. Stat. at Large, 305, § 2, repealing the provision in the Oregon Donation Act that all contracts for the sale of the lands prior to issuance of patent shall be void, a conveyance of a donation claim could be made before issuance of the patent provided the claimant had resided on the land for four years. *Sylvester v. State*..... 585

PUBLIC POLICY:

Confinement of criminal acquitted because of insanity, see INSANE PERSONS, 4.

PUBLIC USE:

Dedication of property, see DEDICATION.

Taking property for public use, see EMINENT DOMAIN. 1, 2, 6, 27.

QUESTION FOR JURY:

See MASTER AND SERVANT, 9, 10.

Construction of contract, see CONTRACTS, 3-5.

As to care of horses, see LIVERY STABLE KEEPERS.

Negligence in driving automobile, see MUNICIPAL CORPORATIONS, 16.

Existence of agency, see PRINCIPAL AND AGENT, 1.

What constitutes employing armed force, see WEAPONS, 3.

QUIETING TITLE:

Transfer of interest pending suit, see ABATEMENT AND REVIVAL.

Form of action, abolishment of distinctions, see ACTION, 1.

Payment of taxes as defense, see ADVERSE POSSESSION, 2.

1. QUIETING TITLE—POSSESSION—ACTION—FORM. The failure of the plaintiff in an action to quiet title to prove that he was in possession or that the land was vacant and unoccupied, is not ground for dismissing the action. *Vietzen v. Otis*..... 402
2. QUIETING TITLE—PLEADING—WAIVER OF OBJECTIONS. An objection that an action to quiet title could not be maintained by one out of possession who failed to allege that the land was vacant and unoccupied, is waived by trial of the issue as to title, raised by answer asking that the title be quieted in the defendants, although a demurrer *ore tenus* was interposed at the trial. *Brown v. Baldwin* 106

QUIETING TITLE—CONTINUED.

3. **QUIETING TITLE—DEFENSES—LACHES.** An action to quiet title is not barred by the laches of the plaintiff, if commenced within the period fixed by the statute of limitations, and there is nothing to warrant the court in fixing a shorter period. *Vietzen v. Otis*... 402
4. **QUIETING TITLE—TRUST OR ESTATE RESERVED—EVIDENCE—SUFFICIENCY.** Where a judgment creditor is seeking to subject to his judgment, lands held in fee by plaintiffs' daughter and son-in-law, claimed by plaintiffs to be held in trust for them to secure a life estate therein, plaintiffs' action to quiet title is properly dismissed for insufficiency of the evidence, where the plaintiffs' evidence of such trust appears not entitled to credit and inconsistent with their acts indicating that the land was conveyed and held in fee simple in consideration of a personal agreement to support the parents for life without any intent to reserve any lien or interest in the land. *Clapp v. Ervay*..... 290

RAILROADS:

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 1, 3, 6-9.
 Condemnation of right of way for other public use, see **EMINENT DOMAIN**, 6, 7.
 Liability of property to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 5, 7.
 Injuries to persons on or near street railway tracks, see **STREET RAILROADS**.

1. **RAILROADS—FIRES—NEGLIGENCE—LIABILITY.** A railroad company is liable for damages resulting from a fire originating from sparks set out by passing trains on the right of way, where it failed to use reasonable care to keep the right of way free from combustible material, although there was no negligence in the equipment and operation of the locomotive. *Fireman's Fund Insurance Co. v. Northern Pac. R. Co.*..... 635
2. **RAILROADS—FIRES—ACTION—EVIDENCE—SUFFICIENCY.** In an action against a railroad company for damages from fire, which burned standing wheat adjoining the right of way, the evidence is sufficient to show negligence on the part of the railroad company where it appears that, in the dry season in August, it permitted much dry grass four or five inches high to stand upon the right of way, and that the fire originated there shortly after a train had passed, and immediately spread to the wheat field. *Fireman's Fund Insurance Co. v. Northern Pac. R. Co.*..... 635

RATIFICATION:

Of act of corporate officer or agent, see **CORPORATIONS**, 5.
 Of act of agent, see **PRINCIPAL AND AGENT**, 2.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Rights of aliens, see **ALIENS**.

Effect of statute of frauds on agreement relating to real property,
see **FRAUDS, STATUTE OF**.

REASSESSMENT:

Of property for benefits from public improvements, see **MUNICIPAL
CORPORATIONS, 10**.

RECEIVERS:

1. **RECEIVERS—APPOINTMENT—PARTNERSHIP.** A receiver is properly appointed at the suit of a partner where his copartner, conspiring with others, wrongfully excludes the plaintiff from participating in the partnership business. *Whipple v. Lee*..... 266

RECORDS:

Transcript on appeal or writ of error, see **APPEAL AND ERROR, 11**.

Right to correction by order nunc pro tunc, see **DIVORCE, 2**.

Records as evidence, see **EVIDENCE, 4**.

REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—FRAUD—EVIDENCE—SUFFICIENCY.**
The evidence is insufficient to warrant the reformation of a warranty deed, so as to except a lease from the covenant of warranty, where it appears that the vendors, upon accepting part payment, gave a receipt calling for a warranty deed and abstract showing clear title and executed the deed containing no reference to the lease, that no representations were made to them as to the contents of the receipt or deed, which they read or had opportunity to read, and that there was no conversation or agreement as to the sale being made subject to the lease; and the fact that the vendee directed the agent to omit any reference to the lease in drawing the deed does not establish fraud. *Weinhard v. Summerville*..... 127

REHEARING:

See **NEW TRIAL**.

RELEASE:

Liability as surety, see **PRINCIPAL AND SURETY**.

REOPENING CASE:

For further evidence, see **TRIAL, 1**.

REPEAL:

Of statute, see **STATUTES, 2**.

REPLEVIN:

Action by married woman, see HUSBAND AND WIFE, 2.

RESCISSION:

Of contract for sale of land, see VENDOR AND PURCHASER, 9.

RESERVATION:

In deeds, see DEEDS, 2.

RES GESTAE:

In civil actions, see EVIDENCE, 1.

RESIGNATION:

Of public office, see OFFICERS.

RES JUDICATA:

See JUDGMENT, 10-17.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 35.

RETIRING PARTNERS:

See PARTNERSHIP, 4.

RETURN:

To writ of certiorari, see CERTIORARI, 2.

REVENUE:

See TAXATION.

REVIEW:

Of error on appeal, see APPEAL AND ERROR.

Statutory writ of review, see CERTIORARI.

In criminal prosecutions, see CRIMINAL LAW, 4, 7.

REVIVAL:

Of action, see ABATEMENT AND REVIVAL.

Of judgment, see JUDGMENT, 2, 8.

REVOCATION:

Of dedication, see DEDICATION.

Of license in respect to real property, see LICENSES.

Of physician's license, see LIMITATIONS OF ACTIONS, 1.

RIPARIAN RIGHTS:

See NAVIGABLE WATERS; WATERS AND WATER COURSES, 1.

Deprivation of, see CONSTITUTIONAL LAW, 4.

Condemnation of, see EMINENT DOMAIN, 10, 11, 15-17, 29.

ROADS:

See HIGHWAYS.

RULES:

Of statutory construction, see **STATUTES**, 3.

SAFE PLACE TO WORK:

See **MASTER AND SERVANT**, 1-3.

SALES:

See **CUSTOMS AND USAGES**.

Validity of anti-trading stamp law, see **CONSTITUTIONAL LAW**, 3.

Construction of contract, see **CONTRACTS**, 5.

On execution, see **EXECUTION**.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

By partners, see **PARTNERSHIP**, 2-3.

Tax sales, see **TAXATION**.

Of real property, see **VENDOR AND PURCHASER**.

1. **SALES—ACCEPTANCE—SUFFICIENCY.** No completed contract of sale appears where, at the time of accepting by telegraph a telegraphic order for ice cans, the manufacturer wrote a letter confirming the acceptance, but requesting either satisfactory references or else remittance for one-half the price with condition that the goods be shipped with sight draft attached to bill of lading, and six days later, having received only the buyer's hurry-up order before receipt of the letter, wrote again for answer to the letter, stating that the order had been entered and that it trusted everything would be arranged to their mutual satisfaction, to which letters the buyer made no reply, and later refused to accept the shipment when notified thereof. *Scaife & Sons Co. v. Standard Ice Co.*..... 297
2. **SALES—CONTRACT—QUANTITY—CONSTRUCTION—ACCEPTANCE—SUFFICIENCY OF EVIDENCE.** The evidence is insufficient to show an entire sale of a quantity of coal, where it appears that, after negotiations for its sale at \$10 per ton, at which no definite agreement was made, the vendee directed his foreman to take what he needed; that the foreman, after taking some, ordered a barge load to be delivered by a carrier; that the vendor, learning thereof, sent notice by the carrier that if any was taken all must be taken, but the foreman refused to accept the coal on that condition and ordered it returned; that the carrier thereupon unloaded the coal, saying he thought it would be all right, and subsequently the foreman took more of it. *Cunningham v. Allen*..... 550
3. **SALES—ACCEPTANCE—EVIDENCE—SUFFICIENCY.** Where, upon the sale of a planing machine, the vendors agreed to accept a return of the same if the machine was not satisfactory, the evidence shows that there was no acceptance or liability for the price, where it appears that, instead of a new machine, one was sent which had been used, with which the vendees from the first and repeatedly thereafter expressed dissatisfaction, specifying various defects, which experts of the vendor could not remedy, the vendees finally offering to return

SALES—CONTINUED.

the machine, and where it appears that the setting up and attempted use of the machine by the vendees for two months was by direction of the vendors under a promise to make it perfectly satisfactory before asking for any money; since the vendees were sole arbiters as to satisfactory performance, and expressed dissatisfaction within a reasonable time. *Tatum v. Geist*..... 226

4. SALES—BREACH OF CONTRACT—DAMAGES—MITIGATION—EVIDENCE.

In an action to recover the price of goods sold, evidence of the amount of insurance received by the vendor for a loss by fire while the goods were in his possession, is admissible in mitigation of the damages. *Moritz v. Herskovitz*..... 192

SEAT OF GOVERNMENT:

See TERRITORIES.

SELF-SERVING DECLARATIONS:

See EVIDENCE, 1.

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE, 1.

Of husband, see HUSBAND AND WIFE, 3.

SERVANTS:

See MASTER AND SERVANT.

SEWERS:

Construction of, by municipality, see MUNICIPAL CORPORATIONS, 2.

SHIPPING:

1. **SHIPPING—CHARTERS—SEAWORTHINESS—NOTICE—CONSTRUCTION OF AGREEMENT.** Where, during five or six days immediately preceding the making of a charter agreement for a small steamer for the period of one year, the officers of the lessee took three or four trips on the boat while operated by the owner, and no fraud was practiced and the lessee had full opportunity to know the condition of the boat, the lessee cannot, after several weeks use, avoid payment of the rent on the plea that the steamer was unseaworthy when chartered, the agreement having expressly provided that the lessee should make all necessary repairs at its own expense and keep the vessel in first-class condition during the term. *Andrews v. San Juan Fish Co.*..... 481

SHORES:

Of navigable waters, see NAVIGABLE WATERS.

SIDEWALKS:

Injuries from defective condition, see MUNICIPAL CORPORATIONS, 18-20.

SILENCE:

- As estoppel, see ESTOPPEL, 4.
As admission, see EVIDENCE, 2.

SLANDER:

- See LIBEL AND SLANDER.

SNOW:

- Accidents due to snow on streets, see MUNICIPAL CORPORATIONS, 19, 20.

SOCIETIES:

- Mutual benefit associations, see INSURANCE.

SPECIFIC PERFORMANCE:

- Of contract by brokers, see BROKERS, 1.

1. SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONTRACT FOR TRADE—PERFORMANCE. Where plaintiff agreed to trade for defendant's city lots certain personal property upon which there were chattel mortgages, and agreed to secure a discharge of such mortgages, specific performance of defendant's contract to convey the lots cannot be decreed, where the plaintiff neglected to secure releases of the chattel mortgages, but allowed the personal property to be sold under foreclosure; and this would be true even if the chattel mortgage was to be discharged by substituting a real estate mortgage on the property, where plaintiff failed to meet the defendant at a time agreed upon to complete the arrangements. *Constantine v. Caswell* 651
2. SPECIFIC PERFORMANCE — LACHES—EVIDENCE — SUFFICIENCY. Specific performance of a contract for an interest in lands will be denied on account of inexcusable laches, where the plaintiff and associates, in 1888, agreed to advance the cost of clearing, platting, and selling the land and paying the taxes thereon, the plaintiff to have a one-sixth interest on the returns from sales, after paying a stated sum to the owner and repayment of disbursements, but plaintiff and his associates failed to perform any part of the agreement during a long period of financial depression, allowing the lands to be sold to the defendant for taxes, in the interest of creditors of the estate of the owner, who carried the same, and where plaintiff only commenced action in 1905, when the land had increased tenfold in value, four years after notice that defendant denied his interest in the property. *Stewart v. Yesler Estate*..... 256

STATES:

- When estopped by deed, see ESTOPPEL, 2.
Public lands, see PUBLIC LANDS, 1.

STATUTES:

See **WEAPONS; EXEMPTIONS.**

Payment of taxes under claim of title, see **ADVERSE POSSESSION**, 2.

Act providing fixed salaries for county officers, see **COUNTIES**, 2.

Action for wrongful death, see **DEATH.**

Proceedings to take property for public use, see **EMINENT DOMAIN**, 3, 16, 21, 26.

Sale of lands allotted to Indians, see **INDIANS**, 1.

Confinement of criminal acquitted because of insanity, see **INSANE PERSONS**, 2-5.

Service of process in action for annulment of marriage, see **MARRIAGE**, 1.

Construction of Congressional grant, see **TERRITORIES**, 2.

1. **STATUTES—TITLES AND SUBJECTS OF ACTS—INTOXICATING LIQUORS.** Laws 1903, p. 31 (3 Bal. Code, § 2944a), entitled an act providing for the search and seizure of liquors kept or used contrary to law, and the punishment as misdemeanors of all violators thereof, does not violate Const. art. 2, § 19, providing that no bill shall embrace more than one subject; and the title is broad enough to include provisions making it a misdemeanor to keep or maintain a place where liquors are kept or sold contrary to law. *State v. Moran*..... 596
2. **STATUTES—REPEAL—REENACTMENT.** The repeal in 1873, of an earlier act, is immaterial where the earlier act was reenacted in 1881. *State ex rel. Thompson v. Snell*..... 327
3. **STATUTES—CONSTRUCTION.** Two acts passed at the same session of the legislature relating to the same subject-matter must be construed together. *State ex rel Miller v. Griffin*..... 489

STIPULATIONS:

Dismissal under stipulation as bar, see **JUDGMENT**, 10.

STOCK:

Corporate stock, see **CORPORATIONS**, 1, 2.

STREET RAILROADS:

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 2, 5, 12, 14.

1. **STREET CARS—NEGLIGENCE—CONSTRUCTION OF TRACKS—RIGHT OF WAY—INSTRUCTIONS.** In an action by a bicyclist who fell in front of an approaching street car, by reason of the alleged negligent construction of cross-over tracks, it is not error in instructing that the street car company had the preference right of way over its tracks, to state that consequently it was plaintiff's plain duty to avoid being on the track. *Hall v. Washington Water Power Co.*..... 207

STREET RAILROADS—CONTINUED.

2. **STREET RAILWAYS—PERSONS ON TRACK—DUTY OF MOTORMAN.**
When a street car motorman sees a man ahead in the street under no disability, he may assume that the other will exercise due care for his own safety, and it is not necessary for him to stop the car until he sees that the other is in apparent danger. *Skinner v. Tacoma R. & Power Co.*..... 122
3. **SAME—CARE REQUIRED AT CROSSING.** It is not negligence for a motorman to fail to have a street car under absolute control at a street crossing so that it may be stopped immediately, where the track is clear and there were no passengers to take on at the far crossing. *Skinner v. Tacoma R. & Power Co.*..... 122
4. **SAME—CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN.** A person is guilty of contributory negligence, as a matter of law, in stepping, on a dark night, in front of an approaching street car ten feet away, with its headlight burning, running within the speed limit, where a car bound in the opposite direction had passed and he knew that the cars were accustomed to meet there, and where the approaching car was in open view for a considerable distance while he was picking his way slowly across the mud and water in the street, without either hearing or seeing the car. *Skinner v. Tacoma R. & Power Co.*..... 122

STREETS:

Dedication, see DEDICATION; MUNICIPAL CORPORATIONS.

SUBSTITUTION:

Of parties pending suit, see ABATEMENT AND REVIVAL.

SUPERSEDEAS:

On appeal or writ of error, see APPEAL AND ERROR, 9, 10.

SURPRISE:

Ground for continuance, see CONTINUANCE, 2.

SUSPENSION:

Of member of benefit insurance society, see INSURANCE.

TAXATION:

Payment of taxes as proof of adverse possession, see ADVERSE POSSESSION.

Service of process as presumption of jurisdiction, see JUDGMENT, 1.

Form of summons in foreclosure proceedings, see JUDGMENT, 3.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 2-12.

TAXATION—CONTINUED.

1. TAXATION—PAYMENT TO PROTECT LIEN. Payment by a city of general taxes in order to protect a supposed prior local assessment lien, is not voluntary, but is a payment in good faith, and entitles the city to a lien for the amount of the taxes paid. *Spokane v. Security Savings Society*..... 150
2. TAXES—PAYMENT—EQUITABLE LIEN. The payment of taxes by persons in possession of land under a void execution sale entitles them to an equitable lien for the amount of the taxes paid and interest. *Vietzen v. Otis*..... 402
3. SAME—FRAUD—PAYMENT TO STRENGTHEN TITLE. One paying taxes for the purpose of defrauding creditors of the owner of the land does not stand in the position of one who acquires a tax title for the purpose of strengthening his own title, and can acquire no rights by such payment. *Solberg v. Baldwin*..... 196
4. TAXATION—SUMMARY SALE—DEEDS—ASSESSMENT—IRREGULARITIES—EFFECT. A sale of lands for city taxes, under summary proceedings requiring a strict compliance with the statute, is void where the assessor failed to prepare an assessment roll in the manner required, or to file any roll within the time limited, and no notice of the meetings of the board of equalization was given, which did not meet within the time limited, and the comptroller failed to prepare or deliver a delinquent list, as required. *Tremmel v. Mess*..... 137
5. SAME—PAYMENT. Payment of taxes can be pleaded to defeat a tax foreclosure, even as against the state. *Solberg v. Baldwin*.. 196
6. TAXATION—FORECLOSURE—DEFENSES. Laws 1899, p. 299, § 18, providing that if, in a tax foreclosure, a defense in writing specify a particular "cause of objection," the court shall hear the same in a summary manner without other pleadings, does not restrict defenses to matters pertaining to the levy and assessment of the tax, or preclude the overruling of a demurrer to a cross-complaint. *Solberg v. Baldwin* 196
7. SAME—TENDER. A tender of a tax is not essential to a defense to a tax foreclosure, where the plea is that the taxes were paid by one in possession having money rightfully applicable thereto, and that the tax title was fraudulently taken in the name of another who was but a dummy for the payor of the taxes. *Solberg v. Baldwin*... 196
8. SAME—DEFENSES—PAYMENT—FRAUD—ANSWER—SUFFICIENCY. An answer denominated a cross-complaint, in a tax foreclosure, is in reality a "statement of new matter constituting a defense," viz., a plea of payment, where it alleges a fraudulent payment of the taxes by one while in possession and receiving rents and profits, who took out a certificate of delinquency in the name of others for the purpose of defrauding creditors of the owners; and under such circumstances a court of equity will not decree a sale of the land for the taxes so paid. *Solberg v. Baldwin*..... 196

TENANCY AT WILL:

See LANDLORD AND TENANT, 4.

TENANCY IN COMMON:

1. **TENANTS IN COMMON—PARTNERSHIP—MUTUAL RIGHTS—RIGHT TO ACQUIRE TITLE—LEASEHOLDS.** Joint lessees of premises are not co-partners thereby precluding one or more from purchasing the premises at the end of the term without being accountable to a co-lessee, desiring to participate in the purchase, but are rather tenants in common, when no condition or fiduciary relationship existed preventing such action as a matter of good faith or public policy; especially where such co-lessee had always treated her half interest in the lease as a separate entity, and invokes equity to recover an interest in the purchase, and made no offer to participate in the sale or pay her share of the price for three years, during which time the value of the property greatly increased. *Kershaw v. Simpson*.. 313

TENDER:

As condition precedent, see CANCELLATION OF INSTRUMENTS, 2.

Of taxes as defense to foreclosure action, see TAXATION, 7.

TERRITORIES:

1. **TERRITORIES—PUBLIC BUILDINGS—DEEDS—GRANTEE.** A territory specially authorized to locate and establish the seat of government for which a Federal appropriation was made for the erection of suitable buildings, has power to acquire and hold land for such purpose, and a deed of land therefor is not void for want of a grantee capable of holding the land. *Sylvester v. State* 585
2. **SAME—POWERS—PUBLIC LANDS—GRANTS—STATUTES—CONSTRUCTION.** The construction of a congressional authority to a territory to locate and establish the seat of government, with respect to the acquisition of land therefor, is not affected by the fact of a later statute, in no way connected with the earlier one, making appropriation for securing sites and erecting a temporary capitol and for a penitentiary. *Sylvester v. State*..... 585
3. **SAME—DEEDS—ESTATE CREATED.** A deed to a territory for a capitol site conveys an estate in fee which passes to its successor, the state, without the use of words of succession in the grant. *Sylvester v. State*..... 585

THEORY OF THE CASE:

As determining scope and extent of review, see APPEAL AND ERROR, 11.

TIME:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 14.

For filing cost bill, see COSTS, 2.

TIME—CONTINUED.

- Establishment of highway by prescription, see **HIGHWAYS**, 1.
- For entry of judgment, see **JUDGMENT**, 4.
- Performance of contract for profits, see **BROKERS**, 3.

TITLE:

- Estoppel to assert title, see **ESTOPPEL**, 2-4.
- To support prosecution for larceny, see **LARCENY**.
- Removal of cloud, see **QUIETING TITLE**.
- Of statutes, see **STATUTES**, 1.
- Defect as ground for rescission of sale of land, see **VENDOR AND PURCHASER**, 9.

TORTS:

- See **ASSAULT AND BATTERY**; **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**; **NEGLIGENCE**.
- Recovery of damages, see **DAMAGES**, 1.
- Causing death, see **DEATH**.
- Injuries by employees, see **MASTER AND SERVANT**, 13.
- Criminal liability of master for torts of servant, see **MUNICIPAL CORPORATIONS**, 14.
- Proper or necessary parties in actions for, see **PARTIES**.
- Injuries caused by operation of street cars, see **STREET RAILROADS**.
- Obstruction and detention of natural water courses, see **WATERS AND WATER COURSES**, 2.
- 1. **TORTS—MALICE—WRONGFUL MOTIVE IN LAWFUL ACT—MASTER AND SERVANT—SELECTION OF HOSPITAL.** A physician who conducts a public hospital has no cause of action against a lumber and railway company for maliciously paying hospital dues, deducted from the wages of its employees, to a rival hospital, and requiring such employees to receive attendance from such rival hospital, after the employees had requested the payment of such dues to the plaintiff, whose hospital they wished to patronize; since the employer may select its own hospital, is under no contract obligation with the plaintiff, and is not liable for malice in lawfully employing men under agreement to attend a hospital of its own selection. *Banks v. Eastern R. & Lumber Co.*..... 610

TRADING STAMPS:

- Validity of anti-trading stamp law, see **CONSTITUTIONAL LAW**, 3.

TRANSCRIPTS:

- Of record for purpose of review, see **APPEAL AND ERROR**, 11.

TRESPASS:

- Limitation of action for damages from change of grade, see **LIMITATION OF ACTIONS**, 3.

TRIAL:

- Instructions invading province of jury, see **ADVERSE POSSESSION**, 1.
 - Review of rulings as dependent on exception in lower court, see **APPEAL AND ERROR**, 7.
 - Scope and extent of review as dependent on theory of case, see **APPEAL AND ERROR**, 11, 12.
 - Conclusiveness of findings on conflicting evidence, see **APPEAL AND ERROR**, 22-24, 26, 27.
 - Review of rulings as to admissibility of evidence as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 33, 34.
 - Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 32-34.
 - Direction of verdict in action for compensation, see **ATTORNEY AND CLIENT**, 4.
 - Continuance in civil actions, see **CONTINUANCE**.
 - Construction and operation of contract, see **CONTRACTS**, 3-4.
 - Of criminal prosecutions in general, see **CRIMINAL LAW**, 1-4.
 - Selection of jury in condemnation proceedings, see **EMINENT DOMAIN**, 21.
 - Instructions in action for violation of liquor laws, see **INTOXICATING LIQUORS**.
 - Judgment of dismissal as res adjudicata, see **JUDGMENT**, 10, 11.
 - Competency of and challenge to jurors, see **JURY**, 2.
 - For libel or slander, see **LIBEL AND SLANDER**, 1.
 - Instructions as to liability of livery stable keeper, see **LIVERY STABLE KEEPERS**.
 - In malicious prosecution, see **MALICIOUS PROSECUTION**.
 - Instructions in actions for personal injuries, see **MASTER AND SERVANT**, 11, 12.
 - Of action for negligence causing injuries to persons using street, see **MUNICIPAL CORPORATIONS**, 16, 19.
 - Motions and grounds for new trial, see **NEW TRIAL**.
 - Objections to pleadings at trial, see **PLEADING**, 2.
 - Instructions as to ratification of agent's acts, see **PRINCIPAL AND AGENT**, 2.
 - Waiver of objections to pleadings by trial of issue, see **QUIETING TITLE**, 2.
 - Construction of contract of sale, see **SALES**.
 - Attendance and examination of witnesses, see **WITNESSES**.
1. **TRIAL—REOPENING CASE—DISCRETION OF COURT.** It is within the discretion of the court to reopen a case for the introduction of further testimony, after motion for nonsuit is made, and no abuse appears where no prejudice or surprise is shown. *Richardson v. Agnew* 117

TRIAL—CONTINUED.

2. TRIAL—EVIDENCE—OBJECTIONS—SUFFICIENCY. It is not error to exclude hearsay evidence, expressly stating that ground, although the same was only objected to as evidence of conversations with a deceased person. *Richardson v. Agnew*..... 117
3. TRIAL—NEW TRIAL—MISCONDUCT OF COUNSEL—APPEAL—HARMLESS ERROR. Misconduct of counsel in argument in referring to a decision of the supreme court upon a former appeal is not reversible error or ground for a new trial, where, upon objection, the court instructed the jury to disregard the same, and both sides had made repeated reference to the decision, and where no abuse of discretion in refusing a new trial on that ground appears. *Brennan v. Seattle*.... 427
4. TRIAL—WAIVER—DEFENSE. A motion by plaintiff for judgment at the close of defendants' case does not waive plaintiff's right to contest the affirmative matter set up in the answer. *Frye & Bruhn v. Phillips* 190
5. TRIAL—NONSUIT—CONFLICTING EVIDENCE. A nonsuit is properly denied where there was sufficient competent evidence to sustain the verdict, although the same was conflicting. *Welch v. Fransioh*.. 530
6. TRIAL—INSTRUCTIONS. Instructions must be considered as a whole, and are not erroneous if no confusion would then arise in the minds of the jurors. *Fireman's Fund Insurance Co. v. Northern Pac. R. Co.*..... 635
7. TRIAL—MISCONDUCT OF JURY. A verdict should not be disturbed on account of misconduct of the jury, alleged by two of the jurors, where the same is contradicted by affidavits of seven other jurors. *Schultz v. Simmons Fur Co.*..... 555
8. TRIAL—NEW TRIAL—MISCONDUCT OF JUROR—APPEAL—HARMLESS ERROR. In an action for injuries sustained through a fall on a sidewalk, which was torn up preparatory to laying a cement walk, a statement of a juror, who visited the premises, as to whether the curb had been raised or lowered, as it looked to him during the trial, which was three years after the accident, is not prejudicial error or ground for new trial, on the ground that it contradicted the testimony of a witness, where the court instructed the jury to disregard such statement, and when the question whether the curb had been raised or lowered was entirely immaterial. *Brennan v. Seattle*. 427
9. TRIAL—VERDICT—WAIVER. It is not error to submit two forms for a general verdict in an action of ejectment, in the absence of any request for special findings as provided by Bal. Code, § 5021. *Stangair v. Roads* 613
10. TRIAL—VERDICT—EXCESSIVE VERDICT—MISTAKE—CORRECTION BY COURT. A verdict for \$1,472.80 will not be held to be the result of passion or prejudice from the fact that, from certain figures and

TRIAL—CONTINUED.

argument, counsel seemed to have conceded that the amount should not exceed \$1,167.10, but rather of a mistake on the part of the jury, authorizing its correction by the court, where the evidence was very conflicting, many items were in dispute, and the amount found was less than the complaint claimed and which might have been allowed under the instruction. *Richardson v. Agnew*..... 117

11. **TRIAL—VERDICT—SPECIAL VERDICT.** In an action by a trespasser for personal injuries sustained in being put off a moving freight train, a special verdict finding that the brakeman did not strike the plaintiff and knock him off the side of the car is inconsistent with a general verdict for the plaintiff, where there was no evidence of any other ground of recovery to sustain the general verdict; and it is error to deny defendant's motion for judgment. *Crowley v. Northern Pac. R. Co.*..... 85

TRUSTS:

See **JUDGMENT, 6; QUIETING TITLE, 4.**

Cancellation of assignment of contract, see **CANCELLATION OF INSTRUMENTS, 5.**

Evidence of payments upon contract held for advances, see **CANCELLATION OF INSTRUMENTS, 6, 7.**

TRUTH:

As justification of libel, see **LIBEL AND SLANDER, 1.**

USAGES:

See **CUSTOMS AND USAGES.**

VALUE:

Value of property as basis for local improvements, see **MUNICIPAL CORPORATIONS, 9.**

Of property in condemnation proceedings, see **EMINENT DOMAIN, 18-20.**

VENDOR AND PURCHASER:

Right of alien to hold realty, see **ALIENS.**

Contract for profits, time of performance, see **BROKERS, 3.**

Sale by administrator under contract by decedent, see **EXECUTORS AND ADMINISTRATORS.**

Sale of community property, see **HUSBAND AND WIFE, 5.**

Sale of Indian lands, see **INDIANS.**

Assignment by heirs of preference right to purchase tide lands, see **JUDGMENT, 5, 6.**

Transfer of mortgaged property, see **MORTGAGES, 4, 5.**

Transfers of ownership of personal property, see **SALES.**

Specific performance of contract, see **SPECIFIC PERFORMANCE.**

Acquisition of title by joint lessee, see **TENANCY IN COMMON.**

VENDOR AND PURCHASER—CONTINUED.

1. VENDOR AND PURCHASER—CONTRACTS—BROKERS—INTEREST IN PROPERTY. A contract reciting that the owner of land agreed to sell the same to plaintiffs at \$150 per acre, the plaintiffs agreeing to plat and sell the land and pay all expenses and taxes, and from the proceeds of sales pay the owner \$150 per acre, is not a brokerage contract that can be forfeited by the owner, but conveys an interest in the lands. *Whipple v. Lee*..... 266
2. SAME—FALSE REPRESENTATIONS—KNOWLEDGE OF FALSITY. In an action by the vendee in a quitclaim deed for false representations of the vendor as to the title, it is error to instruct that the vendee could rely on the representations and recover his damages regardless of the fraudulent intent of the vendor in making the representations; as the vendor is liable only if the representations are made with actual knowledge of their falsity, or under such circumstances that the law would impute knowledge. *Curtley v. Security Savings Society* 50
3. VENDOR AND PURCHASER—FRAUD—REPRESENTATIONS AS TO TITLE. False representations of a vendor as to its title, made with the intent that they be acted on, are as to matters of fact, and may be relied on by the vendee without examination of records showing their falsity. *Curtley v. Security Savings Society*..... 50
4. VENDOR AND PURCHASER—BONA FIDES—NOTICE. Redemption from a judicial sale of a one-acre tract and a specified water right appurtenant thereto, is not notice to a purchaser of the subservient estate of any intent on the part of the redemptioner to claim a greater volume of water than that described in the grant creating the same, although the grant of the subservient estate excepted such greater volume. *Schmidt v. Olympia Light and Power Co.*..... 360
5. VENDOR AND PURCHASER—BONA FIDES—NOTICE—DEEDS. Where the owner of land conveyed one acre, with a specified water right, and afterwards conveyed four acres subject to the water right as described in the prior deed, but expressly describing a greater volume of water as reserved to the first grantee, and the successors in interest of the four-acre tract had no notice of an unrecorded lost deed granting the larger volume of water, they are not chargeable with notice that the owner of the one-acre tract claimed the larger volume of water reserved from the grant of the four acres. *Schmidt v. Olympia Light and Power Co.*..... 360
6. VENDOR AND PURCHASER—BONA FIDES—NOTICE—DEEDS. Where a deed conveying a subservient estate, subject to a water right appurtenant to an estate as granted in a prior deed, reference to which deed is made, describes a larger volume of water as reserved than the amount described in the prior grant, and there is nothing of record to show that the greater volume was ever granted, and no one is in possession of the water or using the same, the holder of

VENDOR AND PURCHASER—CONTINUED.

- the subservient estate is not chargeable with knowledge of the existence of any greater right appurtenant to the dominant estate than the volume described in the grant, and the reservation of the greater right in granting the subservient estate must be rejected as surplusage. *Schmidt v. Olympia Light and Power Co.*..... 360
7. VENDOR AND PURCHASER—BONA FIDES—EQUITABLE INTERESTS. Upon assignment of an equitable interest in land as security for the repayment of future advances, the assignees cannot be in the position of *bona fide* incumbrancers, without notice, as the doctrine of protection of *bona fide* purchasers applies only to purchasers of the legal title. *Norgren v. Jordan*..... 437
8. VENDOR AND PURCHASER—CONTRACT OF SALE—PERFORMANCE—FORFEITURE. Where a contract of purchase required the vendee to examine the abstract within five days, and if not acceptable, to notify the vendor of the defects, who was to have thirty days to cure the same, with the right to declare a forfeiture for nonperformance, a vendee who accepted the title and went into possession, and made no objection for twenty-three days, and then, upon a further installment falling due, gave notice that the title was defective and demanded return of his money without asking that the defects be cured, cannot recover installments paid after the same were declared forfeited by the vendor. *Kane v. Jones*..... 631
9. VENDOR AND PURCHASER—RESCISSION BY VENDEE—TITLE—WAIVER—FORFEITURE OF PAYMENT. Where, before making the first payment, a purchaser of real estate knew that his contract was not with the owner, but with one who only held a contract for the land, the payment made cannot be recovered for defect in the title, where the owner was able and willing to convey, and the contract provided for forfeiture of payments made if the purchaser failed to take the property. *Pierce v. Pettit*..... 668
10. SAME—DAMAGES. In an action by a vendee to recover damages for failure of title, evidence that he had paid \$100 for plans for construction of a house does not warrant a recovery for that amount, in the absence of evidence that the plans are of no value except for the particular purpose for which they were purchased. *Curtley v. Security Savings Society*..... 50
11. SAME—DAMAGES—JUDGMENT PAID—EVIDENCE—ADMISSIBILITY—SUFFICIENCY. In an action by a vendee to recover damages for failure of title, including the amount of a judgment recovered against him for breach of his contract to build a house on the property, the judgment and judgment roll are admissible in evidence to prove certain of the issues, although the vendor was not a party or notified to appear and defend; but are not evidence of the grounds on which the recovery was had, or sufficient alone to warrant a recovery for the amount. *Curtley v. Security Savings Society*..... 50

VENDOR AND PURCHASER—CONTINUED.

12. **SAME—DAMAGES—ATTORNEY'S FEES.** In an action by a vendee for damages for failure of title, reasonable attorney's fees in defending a suit brought against him are recoverable under circumstances permitting a recovery of the amount of the judgment entered in the action. *Curtley v. Security Savings Society*..... 50
13. **SAME—FRAUD—DAMAGES—DUTY TO MITIGATE—EVIDENCE.** In an action by a vendee for damages for failure of title, evidence that the plaintiff had another lot in the vicinity which he might have used to mitigate damages sustained by reason of entering into a building contract, is inadmissible. *Curtley v. Security Savings Society*.. 50

VENUE:

Sale of property under execution, see **MORTGAGES**, 4, 5.

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 21-27.
 Direction of in action for compensation, see **ATTORNEY AND CLIENT**, 4.
 In criminal prosecutions, see **CRIMINAL LAW**, 5.
 Directing verdict in criminal actions, see **MALICIOUS PROSECUTION**.
 Irregularities or defects ground for new trial, see **NEW TRIAL**.
 In civil actions in general, see **TRIAL**, 7, 9-11.

WAIVER:

See **ESTOPPEL**.
 Of objections to taxation of costs, see **COSTS**, 2.
 Service of process, see **EMINENT DOMAIN**, 17.
 Damages sustained by construction of highway, see **HIGHWAYS**, 4.
 Of process by appearance, see **JUDGMENT**, 2.
 Jury trial, see **JURY**, 1.
 Objections to assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 2.
 Trial of issues as waiver of objections to pleading, see **QUIETING TITLE**, 2.
 Of irregularities and errors at trial, see **TRIAL**, 4, 9.
 By purchaser of payments on rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 9.

WARNING:

Duty of master to give, see **MASTER AND SERVANT**, 2.

WARRANTS:

Compelling issuance of, see **MANDAMUS**, 2.

WATERS AND WATER COURSES:

Deprivation of riparian rights, see **CONSTITUTIONAL LAW**, 4.
 Easement by prescription, see **EASEMENTS**, 1.
 Exercise of power of eminent domain, see **EMINENT DOMAIN**, 4, 5, 10, 11, 14-16.

WATERS AND WATER COURSES—CONTINUED.

Estoppel to acquire title to water right, see ESTOPPEL, 4.

Conclusiveness of decree determining extent of water right, see JUDGMENT, 12, 13.

Waters capable of navigation as public highways, see NAVIGABLE WATERS.

1. WATERS AND WATER COURSES—RIPARIAN RIGHTS—EXTENT—IRRIGATION. An upper riparian proprietor is not entitled to divert all the waters of a stream for irrigation purposes, by means of a ditch running through porous soil occasioning much waste, so that none is left for domestic uses of lower owners. *Nielson v. Sponer*..... 14
2. WATERS—APPROPRIATION—IRRIGATION—OBSTRUCTION OF STREAM—EVIDENCE—SUFFICIENCY. The evidence sustains findings for the plaintiff in an action to restrain the obstruction of a stream used for irrigating plaintiff's lands, where it appears that the waters were appropriated and used by the plaintiff and his grantor since 1868, when defendants' lands were unoccupied, and which were not irrigated until 1884, and that after the defendants had constructed dams, the plaintiff could not irrigate his lands as successfully as before, and the evidence for the defendants fails to satisfactorily sustain their contention that the water they were seeking to collect came by seepage from another source than the stream in question. *Desmond v. Sander* 58

WEAPONS:

1. WEAPONS—RIGHT TO BEAR ARMS—STATUTES—VALIDITY—CONSTITUTIONAL LAW. Bal. Code, § 7085, prohibiting the organizing, maintaining or employing of an armed body of men, does not violate Const. art. 1, § 24, guaranteeing the right of an individual citizen to bear arms in defense of himself or the state. *State v. Gohl*.... 408
2. WEAPONS—EMPLOYING ARMED FORCE—WHAT CONSTITUTES. One is guilty of violating the statute prohibiting the organizing, maintaining or "employing" of an armed body of men, where he caused them to assemble and took them in a launch for the purpose of intimidating the master of a schooner and thereby removing a part of the crew; it being sufficient if he "employed" the men in the sense of making use of them for a specific purpose, although he did not "hire" them. *State v. Gohl*..... 408
3. SAME—QUESTION. Upon a conflict in the testimony as to whether defendant employed men, whether they were armed, and as to their mission, the questions are for the jury. *State v. Gohl*..... 408

WIDOWS:

Rights in homestead, see HOMESTEAD.

WITNESSES:

Review of determination of trial court, as to credibility of witness, see *APPEAL AND ERROR*, 21.

Absence of witnesses as ground for continuance, see *CONTINUANCE*, 1.

1. **WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON.** Bal. Code, § 5991, providing that a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had with a deceased person, where the "adverse" party sues or defends as executor, administrator or legal representative of the deceased, does not disqualify an interested party, defending as administratrix, from testifying on behalf of the estate of such deceased as to such transactions had with him. *O'Connor v. Slatter*..... 308
2. **WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED.** A plaintiff claiming under a contract with a person since deceased may testify as to transactions between himself and a third person and as to services performed by him which appear to be the consideration for the contract, and the same does not fall within the statute prohibiting testimony of a transaction had with, or statements made to or by, a deceased person. *Kauffman v. Baillie*..... 248

WORK AND LABOR:

Liens for work and materials, see *MECHANICS' LIENS*.

WRITS:

See *INJUNCTION*; *MANDAMUS*; *PROHIBITION*.

WRONGS:

See *TORTS*.

YEAR:

Tenancy from year to year, see *LANDLORD AND TENANT*, 2.

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